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# INDIANA REPORTS.

VOL. XIV.

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Indiana. Supreme court

REPORTS <sup>4</sup>/<sub>7</sub>

OF

CASES ARGUED AND DETERMINED

IN THE



SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY GORDON TANNER,  
OFFICIAL REPORTER.

VOL. XIV.

CONTAINING THE REMAINDER OF THE CASES DECIDED AT THE NOVEMBER TERM, 1859, AND THE CASES DECIDED AT THE MAY TERM, 1860.

o MERRILL & COMPANY:  
INDIANAPOLIS, IND.  
1861.

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J U D G E S  
OF THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,  
DURING THE PERIOD COMPRISED IN THIS VOLUME.

SAMUEL E. PERKINS,  
ANDREW DAVISON,  
JAMES L. WORDEN,  
JAMES M. HANNA.

Judge WORDEN was Chief Justice at the *May* term, 1860.

**☞ No case is expressly overruled in this volume. For cases explained, followed, &c., see the proper title in the index.**

# **RULES OF THE SUPREME COURT.**

**ADOPTED NOVEMBER TERM, A. D. 1846.**

**I. Motions may be made immediately after the orders of the preceding day are read and the opinions of the Court delivered in; but at no other time, unless in cases of necessity or in relation to a cause when called in course.**

**II. Motions are to be made by the counsel in the order in which their names stand on the record; but no one is to make more than one motion at a time.**

**III. When a motion is founded on a matter of fact which is not admitted, or apparent on the record, it must be supported by affidavit.**

**IV. Rehearings must be applied for during the term in which the decision is made, and by petition in writing setting forth the causes for which the judgment or decree is supposed to be erroneous. The Court will consider the petition without argument, and direct the rehearing, if granted, to one or more points, as the case may require.**

**V. When a cause, whether at law or in chancery, is submitted without argument, each party must furnish the Court with a written statement of the points to be relied on signed by counsel; but when the cause is to be argued, such statement must be submitted to the Court at a convenient time before the calling of the cause.**

**VI. In every cause brought before the Court for trial, one of the counsel for the plaintiff must open his case; he will be answered by the counsel for the defendant, who will be replied to by one of the plaintiff's counsel; and this will end all discussion.**

**VII. But two counsel will be allowed to argue on one side of any cause without leave of the Court, which may never be asked for except in a case of importance and difficulty.**

**VIII. On motions and collateral questions, but one counsel will be heard on either side without leave of the Court.**

**IX. In original cases in chancery, all extrinsic objections to depositions or other exhibits, must be made before the final hearing of the cause.**

**X. The clerk of this Court shall not permit the papers, in any cause, to be taken from his office or from the Court room, except by one of the judges.**

**XI. In appeals, the same rules shall be observed with respect to the assignment of errors as in writs of error.**

XII. Supersedeas-bonds may be executed in the clerk's office of the Court below, with surety to be approved of by such clerk, in a sum sufficient to include the judgment, damages, and costs. If a certified copy of the bond be presented to the clerk of this Court, on application for a supersedeas or for a writ of error to operate as such, the same may be issued in the usual form. The writ may also issue, though such copy be not presented. In that case the clerk shall indorse on the supersedeas, or on the writ of error indorsed to operate as a supersedeas, that it shall not stay the proceedings until the bond be executed as aforesaid, and an indorsement be made by the clerk below on the supersedeas, or on the writ of error, that the bond has been executed and approved of as aforesaid. And a certified copy of the bond shall be filed in the clerk's office of this Court on or before the first day of the term next ensuing the granting of the writ.

XIII. The clerk, during the term, may deliver the transcript of a cause to the counsel of either party, on being furnished with a receipt for the same. The transcript to be returned to the office within two days, or sooner if required.

XIV. All transcripts must be delivered to the clerk at his office, and the causes be there docketed.

XV. Applications for writs of supersedeas in term time, must be made by delivering the transcript and briefs to the clerk at his office. And the clerk must deliver such transcripts and briefs to the judges at their chambers, on the evening of the day on which he receives them.

XVI. When a cause in error is called, which has been docketed more than 90 days before the term, and there is no appearance for the defendant (process not having been served 10 days nor taken out 60 days before the term), the suit shall be dismissed.

XVII. If a cause be docketed on or before the first day of the term, and, if in error, the process have been served 10 days before the term, the parties must be ready when the cause is called.

XVIII. No motion for a *certiorari* in cases of diminution of the record will be heard, unless the motion be made in writing, and state the defects to be supplied.

XIX. If, when a cause is called, the plaintiff fail to appear, the defendant may have the cause dismissed, or may submit it either with or without argument. If the defendant make default, the plaintiff may proceed *ex parte*.

XX. The assignment of errors shall contain the names of the parties; and process, when necessary, shall issue accordingly.

XXI. Subsequently to the present term (Nov. T., 1846), the causes shall be decided by the Supreme Court in the order of time in which they have been, or shall be, submitted, cases of emergency excepted.

XXII. Appearances to suits in this Court shall be entered in the clerk's office.

XXIII. The rule as to the order of time in deciding causes does not apply to plain cases.



# RULES OF THE SUPREME COURT.

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## ADOPTED NOVEMBER TERM, A. D. 1852.

XXIV. Applicants for admission to the bar will be sworn as attorneys upon proof that they are voters and of good moral character.

XXV. No submission of a case will be permitted without a brief by the party submitting it; and, after the present term, only printed briefs will be received.

XXVI. The pages, and lines upon the pages, of transcripts, must be numbered before the cause is submitted, and the transcript must be referred to in the briefs by page and line.

XXVII. Attorneys upon opposite sides, in each case, will be required, upon request, to interchange briefs.

[This rule requires an interchange only upon request. Neglect to request such interchange does not impose on the appellee the necessity of answering errors not assigned, nor upon the Court to decide them. *Hollingsworth v. The State*, 8 Ind. R. 257.]

XXVIII. Points not made in some of the briefs by counsel, will be considered as waived in the suit in which the briefs are filed, and may be treated by the Court accordingly.

[This rule has been strictly observed in numerous cases. See *The Jeffersonville Railroad Co. v. Butler*, 9 Ind. R. 205; *Henderson v. Burch*, 10 id. 54; *Shaw v. Binkard*, id. 281; *Zehner v. Crall*, id. 547.]

XXIX. The volume containing any case cited in a brief, must be placed within the reach of the Court; or the opinion in the case, or such part of it as is relied on, must be accurately copied, with the statement of the facts on which it is based, and so much of the context as forms a qualification of or exception to it.

XXX. In every bill of exceptions, purporting to set out the evidence, upon motion for a new trial overruled, the words "this was all the evidence given in the cause," are to be regarded as technical, and indispensable to repel the presumption of other evidence.

It is ordered that this rule operate on all causes tried in the Circuit Courts and Courts of Common Pleas, after June 1, 1853.

[This rule was adopted to avoid the embarrassment constantly occurring in giving construction to ambiguous language, as in the case of *Montgomery v. Doe*, 4 Ind. R. 266. Its policy, to secure accuracy, and to lead the Court at once to the main question, is obvious; and compliance with it easy. *The New Albany, &c., Railroad Co. v. Callow*, 8 Ind. R. on p. 473. The rule has been rigidly adhered to in numerous cases since. See *Nutter v. The State*, 9 id. 178; *The Jeffersonville Railroad Co. v. Butler*, id. 205; *McCole v. The State*, 10 id. 50; *Beard v. The First Presb. Church*, id. 568; *Forgey v. Tucker*, 11 id. 320; *Powell v. Pierce*, id. 322; *Chapel v. Washburn*, id. 393. See, also, Index, *h. t.*]

## ADOPTED NOVEMBER TERM, A. D. 1853.

XXXI. Causes may be submitted without a brief during the sitting of the Court, at the Supreme Court room, in the State House; but every such submission will be set aside at the costs of the party making it, where a printed brief is not filed in the cause by the submitting party within 60 days from the date of submission.

**RULES OF THE SUPREME COURT.**

**XXXII.** Prosecuting attorneys will not be required to file printed briefs in cases wherein they appear as such for the defendant.

**ADOPTED NOVEMBER TERM, A. D. 1854.**

**XXXIII.** All cases submitted under the rule giving leave to file a brief in 60 days shall stand dismissed, if the brief is not filed with the clerk within that time.

**XXXIV.** On the call of the docket at each term, every cause filed one year prior to the first day of such term and not submitted, shall be dismissed at the cost of the party bringing the case up, unless upon such call the cause be submitted on printed brief.

**XXXV.** The 31st Rule allowing causes to be submitted with leave to file brief in 60 days, is hereby modified so as to apply only to causes filed within 30 days prior to the first day of the term; and all causes filed more than 30 days before the first day of term can be submitted only on printed brief filed at the time of submission under the 25th Rule.

**XXXVI.** Causes submitted under the sixty-day Rule shall not be distributed to the judges till after the 60 days expire.

**XXXVII.** After submission the papers shall not be permitted to pass out of the hands of the judge to whom they are allotted; but either party may have a copy of the record, or any part of it, from the clerk, upon the payment of proper fees.

**XXXVIII.** The 13th Rule is rescinded; and the clerk is directed to keep the records; to permit inspection of them in his office; or, on payment of proper fees, to furnish copies.

**ADOPTED MAY TERM, A. D. 1855.**

**XXXIX.** Written briefs may be filed, and oral arguments made in causes in the Supreme Court; but no such brief will be received, except in open Court, at the time the cause is submitted; nor will oral argument be heard, except at that time, unless the Court may desire to hear such argument afterwards. Causes may, however, be submitted by consent of parties at any time, on printed brief by the submitting party, before the clerk of said Court.

**XL.** Printed briefs may be filed at any time before the cause is decided.

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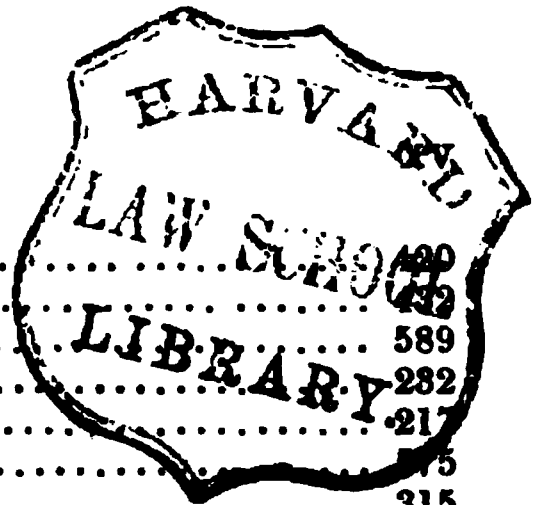
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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1859, IN THE FORTY-  
FOURTH YEAR OF THE STATE.

---

LOFTON *v.* THE STATE.

APPEAL from the *Washington* Circuit Court.

*Saturday,*  
*December 24.*

*Per Curiam.*—Indictment against the appellant for the murder of one *John Vogles*. Trial, conviction of manslaughter, and judgment over a motion for a new trial.

On the calling of the cause for trial, the defendant filed an affidavit for a continuance. The affidavit seems to contain all the requirements of the law, and states, in substance, that he could not go to a trial at that term on account of the absence of one *Margaret Ann Brown*, who had, at the previous term, been duly recognized to appear as a witness at that term, but who, from sickness, was unable to attend; that he could prove by said *Margaret* the following facts: "That he was going peaceably along the public highway, without making any hostile demonstration whatever, when the deceased, *John Vogles*, commenced a violent assault upon him, and that the defendant told the

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CHENOWITH.

deceased, in a friendly manner, not to strike him, and affiant receded from the deceased, and did not strike nor offer to strike him until after the deceased seized the affiant and commenced beating and kicking him with considerable violence; that as soon as affiant could release himself, he desisted from defending himself and retreated; that it was during the time that he was so beaten, seized, and kicked as aforesaid by the deceased, that affiant struck the blow which is charged to have caused the death of the deceased, *John Vogles*." The affidavit states that the facts thus set out are true, and that he cannot prove them by any other witness whose testimony can be as readily procured, and that the affidavit was not made for delay merely, &c. The affidavit of the husband of the witness was also filed, showing her inability to attend on account of sickness.

We are of opinion that the facts thus set up were material to the defense of the accused, and, therefore, that the continuance should have been granted.

The judgment is reversed, and the cause remanded.

*C. L. Dunham, W. T. Otto, and H. Heffren*, for the appellant.



#### CHENOWITH v. CHENOWITH.

If a *feme covert* obtains a divorce and alimony, she has no interest, as survivor, in the estate of the husband.

Saturday,  
December 24.

APPEAL from the *Boone* Circuit Court.

HANNA, J.—Application for divorce, which was granted on account of the misconduct of the husband. The custody of the offspring of the marriage, one child, was decreed to the wife, and 1,000 dollars alimony [allowed her], to be paid in installments, if security should be given; if not, execution to issue, &c.

It is insisted that the amount of alimony awarded is

excessive, and the judgment erroneous in not specifically pointing out the form of surety to be given, and the manner of its approval.

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v.

YOUNG.

The argument in regard to the amount of alimony is, among other things, pressed upon the hypothesis that such allowance is not in lieu of interests which the appellee might have in the appellant's property if she should survive him. In other words, that she may yet insist upon those rights, &c., notwithstanding the divorce, if she should survive him. This is a mistake; her marital interest, as survivor, depended upon her being his wife at the time of his death. Bish. on Mar. and Div., pp. 661, 667, 797.—*Rourke v. Rourke*, 8 Ind. 438.—*Rice v. Rice*, 6 *id.* 106.—*Whitsell v. Mills*, *id.* 229.

As to the form of the judgment, it is insisted by the appellee that no question is before the Court in relation thereto. No objection, motion, nor application to the Court, in any form, nor exception to the ruling of the Court; in regard to the rendition of said judgment, appears in the record. We are, therefore, of opinion that there is, upon that point, nothing before us for our decision. There was no motion, assigning causes in writing, for a new trial, as required by statute.

*Per Curiam*.—The judgment is affirmed with 3 per cent. damages and costs.

*A. J. Boone*, for the appellant.

*L. C. Dougherty*, *J. E. McDonald*, and *A. L. Roache*, for the appellee.

---

LEMEN and Others v. YOUNG and Others.

APPEAL from the *Madison* Circuit Court.

Saturday,  
December 24.

*Per Curiam*.—Suit before a justice upon an official bond. The principal in the bond, in writing, waived ser-

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v.  
LENFESTY.

vice and entered his appearance. Trial and judgment for the plaintiffs. The other defendants did not appear.

In the Circuit Court, the plaintiffs and said *Lemen* appeared. There was a trial and judgment for the plaintiffs against the "defendants." It is manifest that the entry of the judgment against all the defendants, by writing the word *defendants* instead of *defendants*, was a mere clerical error which might have been amended by motion in the Court below, and will be regarded here as having been so amended, under the statute, so as to make the judgment operative only against the one.

The judgment is affirmed with 5 per cent. damages and costs.

*W. March* and *J. Davis*, for the appellants.

*W. R. Pierce*, for the appellees.

---

STEBBENS v. LENFESTY.

Saturday,  
December 24.

APPEAL from the *Grant* Circuit Court.

HANNA, J.—Suit on note.

Answer, first, denial; second, that defendant did not execute and deliver said note, &c.; third, want of consideration, setting out facts, &c.; fourth, failure of consideration, setting out the facts relied on, &c.

Reply, in effect, denying the third paragraph of the answer. No notice taken of any other.

Trial, verdict and judgment for the plaintiff. Motions for a new trial and in arrest overruled.

The only evidence given was the note.

This judgment must be reversed. The fourth paragraph of the answer, as presented by the record, appears to stand uncontradicted. The facts averred in it, therefore, under the statute, were admitted, namely, that the consideration for which said note had been given had failed.



*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c. Nov. Term, 1859.

*A. Steele, H. D. Thompson, and M. L. Marsh*, for the appellant.

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v.  
RAMSEY.

*J. Brownlee*, for the appellee.

MAY and Others v. CRAWFORD.

APPEAL from the *Marion* Court of Common Pleas. Saturday, December 24.

*Per Curiam.*—In this suit, the amount claimed and recovered was for 1,000 dollars. The Court had no jurisdiction.

The judgment is reversed with costs. Cause remanded, &c.

*M. G. Bright, E. Dumont, and O. B. Torbet*, for the appellants.

PAVY and Another v. RAMSEY, Executrix.

Where the judge of the Common Pleas is counsel in a case cognizable in that Court, the suit ought to be brought in the Circuit Court.

APPEAL from the *Fayette* Circuit Court.

Saturday,  
December 24.

HANNA, J.—Suit on a note for 1,100 dollars, due February 2, 1858. Judgment by agreement against *James*, the principal, and, by agreement, certain issues tried by a jury as to the liability of *Pavy*, who was admitted to be a surety only. Those issues were, denial, payment, and discharge by failure to sue after written notice, &c. The case, as to the surety, turned upon the latter issue. It is

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RAMSEY.

complained that the Court erred as to instructions; and that the evidence does not sustain the verdict, &c.

The answer avers that the notice to sue was given on the 5th of *January*, 1858. The reply is that such notice was received about the 1st of *April*, 1858. The suit was brought at the first term of the Circuit Court thereafter. The evidence shows that when the notice was given, there were credits on the note reducing the amount due to a sum less than 1,000 dollars; that, upon maturity, the note was placed in the hands of *Reid*; that he was the Common Pleas judge, &c., but attorney for the plaintiff in all matters not "arising or directly concerned in the Common Pleas Court. *Heron* and *Wilson* were her attorneys in that Court."

The verdict returned was for the plaintiff, &c.

The instructions were upon the question whether a suit should have been instituted in the Common Pleas. That refused is, perhaps, proper as an abstract proposition; but when viewed in reference to the evidence in this case, we think, was properly refused under § 9, 2 R. S. p. 17, which provides that where the Common Pleas judge has been, or may be, of counsel, &c., in a case cognizable in that Court, suit shall be brought in the Circuit Court, &c. It would seem to be useless to bring a suit in a Court merely to have the jurisdiction ousted. *Witter v. Taylor*, 7 Ind. R. 111. If we are right in the conclusion that, under the circumstances, the suit ought not to have been brought in the Common Pleas, before Judge *Reid*, then the defense fails.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*N. and G. Trusler*, for the appellants.

*J. S. Reid*, for the appellee.

DAVIS *v.* BOND and Another.Nov. Term,  
1859.DAVIS  
*v.*  
BOND.

Where the contracts concerning which matters of difference submitted to arbitrators arose, did not waive relief from the appraisement law, but a clause in the arbitration bond provided that the award might be made a rule of Court, and judgment entered without relief; *held*, that, under the statute of 1843, judgment was properly so rendered.

APPEAL from the *Laporte* Circuit Court.Saturday,  
December 24.

ILLIANA, J.—In this case, the matters of difference were submitted to the arbitration of persons mutually chosen. Bonds were executed, an award made, returned to Court, proved, and a rule entered that the appellant show cause, &c.

The appellant did not appear. There was judgment upon the award, after which there was an appearance by counsel, and an appeal prayed.

The appellant makes two points, both arising upon the judgment—

1. That a judgment was rendered in favor of both appellees, for a sum found in favor of one.

2. That the judgment is without relief, &c.

The contracts and agreements, concerning which the matters of difference submitted to arbitration arose, did not waive relief from valuation, &c.; but there was a clause in the arbitration bonds which provided that the award might be made a rule of Court, &c., and judgment entered without relief from valuation laws.

It is insisted that the statute of 1843 does not authorize a waiver of the right to have property valued, &c., in instruments of this character. That statute is, that “from and after the first day of *June* next, if any person or persons, for a consideration arising wholly after that time, shall agree in writing to pay any sum of money, without any relief whatever from valuation or appraisement laws, judgment shall be rendered accordingly,” &c. Acts of 1843, p. 52.

We are of opinion that the objection is not well taken. It is true, at the time the agreement was made, the sum to

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BATES.

be paid was not ascertained and fixed; but by that agreement, the matter was referred to certain persons, that the amount to be thus paid might be ascertained. The statute does not say that agreements to thus pay shall be binding only as to fixed or certain sums, but is as to agreements to pay any sum, and we think properly includes this agreement.

As to the other error assigned, whether the objection was well taken or not, we need not decide, as the record has, since the said assignment, been, upon *certiorari*, so corrected as to show that the finding corresponds with the judgment.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*J. B. Niles and A. L. Osborn*, for the appellant.

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#### THE INDIANA POTTERY COMPANY v. BATES and Others.

If a firm pays for land, and the conveyance is to one of the partners, there is a resulting trust in favor of the firm.

And in a suit by one claiming title under the firm for a conveyance of the land, the heirs of the trustee are proper defendants; and they cannot object that the surviving partners and the heirs of those deceased are made co-defendants.

Saturday,  
December 24.

APPEAL from the *Perry* Circuit Court.

HANNA, J.—The complaint states that, in 1836, *Samuel Casseday, James Cleus, William Bell, Reuben Bates*, and seven others, were associated as partners under the style of the *Lewis Pottery Company*, for the manufacture of earthenware and china, and were possessed of certain lands in said county; that in 1836, they bought from *Thomas E. Greswold*, for the purpose of said partnership, a tract of land containing six acres, adjoining the town of *Troy*; that at the suggestion of the said *Bates*, who was one of the members of said partnership, said purchase was made

through him, and in his name, and a conveyance executed by *Greswold* and wife to *Bates*, on the 27th day of *July*, 1836, and the consideration therefor, 120 dollars, paid to *Greswold* by *William Bell*, treasurer, for and on behalf of the company, and a receipt therefor given at the foot of the deed; both of which (the deed and the receipt) are made part of the complaint.

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BATES.

It is further alleged that, by a verbal understanding and agreement, *Bates* was to hold the land for the company, by whom the consideration was paid.

It is also alleged that in *January*, 1837, the company was incorporated by the general assembly, under the style of the *Indiana Pottery Company*, and organized, and the partners, by a verbal agreement, for a consideration, adjusted in full, sold the land and their other real and personal partnership property to the incorporated company; and the purchaser took possession of, and made valuable and lasting improvements upon, said lands with the knowledge and consent of *Bates*. The widow and heirs of *Bates* and the surviving members of the partnership, with the heirs of those deceased, are made defendants, and a conveyance of the land is prayed for.

The heirs of *Bates* demurred to the complaint—

1. Because of an alleged failure to state facts sufficient to constitute a cause of action.
2. Because the members of the company are defendants.

The demurrer was sustained by the Court below, to which plaintiffs excepted and appealed.

As to the first objection, it was insisted by plaintiff that the complaint showed an implied or constructive trust, such as is within the contemplation of the saving clause in the "Act for the prevention of frauds and perjuries (R. S. 1831, p. 269, § 5), while on the part of defendants it was urged that because it is alleged that *Bates* took and held the land under a verbal agreement, the trust is an express one, and cannot be implied or resulting, and that an action to enforce it is barred by the statute.

The saving clause in the section referred to makes valid

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v.  
FLEMING.

any verbal transfer of real estate "by which a trust or confidence shall or may arise or result by the implication or construction of law."

The demurrer was not well taken.

It has been often decided by this Court, that if one person pays the consideration for land, and the conveyance is to another, there is a resulting trust in favor of the one who advances the money to make the payment. *Resor v. Resor*, 9 Ind. R. 347, and authorities cited.

The heirs of *Bates* were assuredly proper parties, and it is not for them, under the circumstances, to say that their co-defendants are not proper parties. But although, perhaps, they might not have been necessary parties, a question we need not decide, yet there could be no objection to making them parties for the purpose of concluding them as to any resulting interest which they might at any time set up as *cestui que trusts* of said *Bates*.

That they were, or had been, members of the original company, and afterwards of the corporation, cannot preclude the corporation, which may number a hundred other members, for ought that appears on the record, from the maintenance of the suit, where the contract was made by individual members with the said corporation.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*B. Smith* and *J. Pitcher*, for the appellants.

*L. Q. DeBruler* and *D. T. Laird*, for the appellees.

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ARNOLD and Another v. FLEMING, Administrator.

Saturday,  
December 24.

APPEAL from the *Lagrange* Court of Common Pleas.

HANNA, J.—*Fleming* obtained a judgment before a justice for less than 100 dollars against appellants. Defendants appealed, and moved to dismiss the cause on the

ground that an administrator could not sue before a justice. Nov. Term,  
1859.

By the 2 R. S. p. 17, § 4, Common Pleas Courts have exclusive jurisdiction in suits against executors, &c. But we know of no statute by which the right of executors, &c., to sue in the justice's Court is taken away. That right, with limitations as to amounts, existed before the enactment of the statute quoted. The justices' act appears to confer jurisdiction within a given amount, without reference to the character in which a party sues. THE JEFFERSONVILLE, & C.  
RAILROAD CO.  
V.  
FERRY.

*Per Curiam.*—The judgment is affirmed with 10 per cent. damages and costs.

*J. M. Flagg*, for the appellants.

*J. B. Howe*, for the appellee.

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### THE JEFFERSONVILLE RAILROAD COMPANY *v.* FERRY and Others.

APPEAL from the *Bartholomew* Circuit Court.

Saturday,  
December 24.

HANNA, J.—An application was made by the appellees to compel the appellants to take the necessary steps to assess the damages which it is alleged were caused to the real estate of the appellees by the construction of the road of the appellants. An alternative mandate was granted, to which the company appeared and answered in denial. The evidence was heard and the order made absolute. From this order the company appeals.

The only question in the case is, whether a peremptory mandate should have been ordered.

It appears that within two years after the company took possession of the land described, upon which was a warehouse, *Ferry* and others filed a claim with the company for damages, naming an appraiser, &c., and fully describing the property and its location, except that it was alleged to be in section 25, when in truth it was in section 23. The

Nov. Term,  
1859.

PARKER  
v.  
McALLISTER.

company, as provided by their charter, also appointed an appraiser, but upon the discovery of the mistake in the description, directed him to desist from making the assessment, &c.

The proper correction was afterwards made in the title deeds, &c., and in the description of the land, but the appellants had not caused the assessment of damages to be made.

It is insisted that, as the property was taken possession of since the adoption of the new constitution, the appellees had an ample remedy at law, without a resort to a mandate. This proposition is based upon the provision of that instrument, to the effect that "no man's property shall be taken by law, without just compensation; nor except in case of the state, without such compensation first assessed and tendered."

We are not able to perceive how this question can fairly arise upon the record as presented to us. There does not appear to have been any demurrer filed to the complaint setting forth the facts upon which a mandate was prayed. The ruling of the Court upon the motion to quash the alternative writ was not excepted to. The record does not profess to set forth all the evidence.

*Per Curiam.*—The judgment is affirmed with costs.

*C. E. Walker*, for the appellants.

*W. Singleton*, for the appellees.

Where a contract for the sale and conveyance of land provided that the first payment of the purchase-money should be made "by the first day of August," it was held that an offer to pay on the 31st day of July, was not premature. The language quoted is equivalent to "on or before," &c.

Where, by the terms of a contract for the sale and conveyance of land, the payment of the first installment of the purchase-money was to precede the execution of the deed, but the vendor refused to receive the money and exe-



cute the deed, a complaint by the vendee for specific performance, is not bad for not containing an averment of a tender of the notes and mortgage for the subsequent installments.

Nov. Term,  
1859.

An action for the specific performance of such a contract, must be commenced in the county where the land is situate.

PARKER  
v.  
MCALLISTER.

Where the answer in such an action set up the tender of a deed, and set forth a copy of it, a demurrer upon the ground that the wife of the vendor was not joined, was held bad, because it was not shown that he had a wife. That fact should be affirmatively shown by a reply.

A contract to make a deed or to convey, implies that the conveyance shall give the vendee a sufficient title, in view of the provisions of the statute defining what a deed must contain.

### APPEAL from the *Dearborn* Circuit Court.

Saturday,  
December 24.

HANNA, J.—The complaint avers that the parties, on the 17th day of *February*, 1857, made a written agreement, by which *Parker* agreed to “sell and convey” to *McAllister* a certain described tract of land for 889 dollars; “88 dollars, 90 cents, with interest, to be paid by the 1st of *August*, 1857,” the balance in nine annual payments, to be secured by mortgage, &c.; said *McAllister* to have immediate possession, and “when the first payment is made said *Parker* to deed said land to said *McAllister*.”

It is further averred that, “on the 31st day of *July*, 1857, the plaintiff called on the defendant and offered to pay him the full amount of the first payment, &c.; that the defendant refused to accept the payment, and positively declared that he never would convey said land to the plaintiff; that afterwards, on the 1st day of *August*, the plaintiff prepared nine notes and a mortgage, &c., and went to the house, being the place of business of the defendant, to deliver them and make said payment, but could not find said defendant; “that he is, and always has been, ready to comply,” &c.

The complaint was demurred to, and the demurrer overruled, which raises the first point to be decided.

It is insisted that the offer to perform was not sufficient, because it was prematurely made.

As the agreement provided that the first payment should be made “by the first of *August*,” the averment of the offer to pay on the 31st of *July*, was sufficient. *Barbee v.*

Nov. Term,  
1859.

PARKER  
v.  
MCALLISTER.

*Inman*, 4 Blackf. 420. The language used is equivalent to an express undertaking that the payment should be made on or before the first day of *August*. The party in this case who was to make the payment, had the election as to the time, within the stated limit, at which the payment should be made.

In the case of *Reed v. Rudman*, 5 Ind. R. 409, relied upon by the appellant, the election was with the party who was to make the deed, and therefore he had the full time to perform the act, and, if necessary, perfect his title. He might, perhaps, in that case, have tendered a deed before the last day, and demanded the consideration.

The second cause of demurrer is, that there is no averment of a tender of the notes and mortgage on the 31st of *July*.

By the terms of the contract, the payment of the first installment was to precede the execution of a deed by the vendee. The making of the deed was the next thing in order; for regularly no mortgage could be made by the vendee until the vendor had passed the title to him. As the vendor refused to accept the money, and, so far as he could, repudiated the contract, the tender of a mortgage could not be made; for the vendee had no legal title to the land to mortgage.

The third, fourth, fifth, sixth, and seventh causes of demurrer assigned, are disposed of in what has been already said upon the first and second.

The eighth cause is, that the Courts in *Dearborn* county had no jurisdiction of the case, as the land sold was situated in *Franklin* county, as shown by the complaint.

It is urged that a decree for the specific performance of this contract, and the conveyance of said land, although formerly a transitory action, is now local under the 2 R. S. p. 33, § 28, which is, that an action must be commenced in the county in which the subject of the action, &c., is situated:

“*First*. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest,” &c.

It is said this suit will determine the right or interest of the parties to the land named in the contract. It has been decided that such an action as this "operates upon the person, and may be instituted in any county where the contractor resides." *Coon v. Cook*, 6 Ind. R. 270. That case is relied upon by the appellee as decisive. We do not so consider it. The record in that case shows that it was instituted and decided before the present statute was in force. It has been decided in the Superior Court of the city of *New York*, under a statute precisely similar to ours, except that the word *tried* is employed instead of the word *commenced*, that the action is local. *Ring v. McCoun*, 3 Sandf. 528. The change of the single word, if it has any effect, would, according to the reasoning of that case, make the action more certainly local under our statute. This case was referred to approvingly, though the point was not directly involved, in the case of *Newton v. Bronson*, 3 Kern. 592, by the Court of Appeals of *New York*.

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1859.

PARKER  
v.  
MCALLISTER.

The defendant answered—first, a general denial; second, third, fourth, fifth, sixth, and seventh, raising the same questions that were raised by the demurrer, and have been already considered.

The eighth paragraph averred that on the 14th day of *August*, the defendant, being the owner of said land, prepared a deed therefor in pursuance to said contract, and tendered the same to the plaintiff, and demanded the first payment, and that said mortgage and notes to secure the balance of the purchase-money should be executed, &c., and offered to pay the costs that had then accrued in this case, but that the plaintiff refused, &c. The deed mentioned in said paragraph is set forth in the record, by order of the Court, upon oyer craved by plaintiff, and is in the form of a quitclaim of the right, &c., of said vendor.

The plaintiff demurred to the said paragraph of the answer, because, first, it does not contain covenants of warranty, &c.; second, because the wife of said *Parker* did not join, &c., nor is it alleged he had no wife, &c. The demurrer was sustained.

As to the last cause assigned, it is not well taken. The

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1859.

GILES  
v.  
LAW.

record does not show that *Parker* had a wife. If such was the fact, it should have been affirmatively shown by reply.

As to the sufficiency of the deed upon the other point, we think that the contract to make a "deed" and to "convey," meant and implied that it should be such a deed and conveyance as would give the vendee a sufficient title in view of the provisions of the statute which defines what is necessary to be contained in a deed. But for the reasons above given the judgment must be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*T. and C. Gazlay*, for the appellant.

*P. L. and B. J. Spooner*, for the appellee.



#### GILES and Another v. LAW.

Saturday,  
January 14,  
1860.

APPEAL from the *Hancock* Court of Common Pleas.

*Per Curiam.*—This case was correctly decided for the plaintiff below, for the reasons given in the case of *Giles v. Gullion*, 13 Ind. R. 487; but the judgment is for too much. There was only due on the note sued upon, at the time the judgment was rendered, the sum of 58 dollars, 60 cents, while the judgment is for 94 dollars, 33 cents. If the excess is remitted the judgment will be affirmed at the cost of the appellee for the amount due; otherwise the judgment will be reversed.

NOTE.—A remission having been filed, the judgment was affirmed for 58 dollars, 60 cents.

*N. R. Lindsay* and *T. J. Harrison*, for the appellants.

*J. Green*, for the appellee.

SCOTT and Others v. DIBBLE and Others.

Nov. Term,  
1859.

BOXLEY  
v.  
CARNEY.

APPEAL from the *Kosciusko* Court of Common Pleas.

*Per Curiam*.—Suit on a note. The parties appeared, but no answer was filed. A jury was waived, and the matters submitted to the Court. Judgment for the plaintiff.

Saturday,  
January 14,  
1860.

It is insisted that there was a trial without an issue, and therefore an error.

The failure to answer was, for certain purposes, an acknowledgement or confession of the complaint, and if it was necessary to hear proof to enable the Court to render a judgment, this was not, strictly speaking, a trial without an issue, under our code of procedure.

The judgment is affirmed with 5 per cent. damages and costs.

*J. L. Ketcham, I. Coffin, and G. W. Frasier*, for the appellants.

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BOXLEY and Others v. CARNEY and Others.

APPEAL from the *Hamilton* Circuit Court.

*Per Curiam*.—Complaint by the appellees against the appellants to foreclose a mortgage, and judgment by default.

Saturday,  
January 14,  
1860.

Several errors are assigned, but as no steps were taken in the Court below to correct the supposed irregularities, according to repeated decisions at the present term, they cannot be noticed here.

The appeal is dismissed with costs.

*E. S. Stone and W. W. Conner*, for the appellants.

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1859.

McNEER and Others v. DIPBOY.

McNEER  
v.  
DIPBOY.

A pleading denying the execution of a written instrument, is valid without being sworn to.

Saturday,  
January 14,  
1860.

APPEAL from the *Madison* Court of Common Pleas.

WORDEN, J.—Complaint by the appellee against the appellants on a note.

Answer, that after the making of the note, and before the commencement of the suit, the plaintiff, for a valuable consideration, executed a written release, whereby he released the defendants from the payment of the note, which release was lost, &c.

Reply in denial.

Demurrer to the replication overruled, and judgment for the plaintiff.

The only point made in the case, relates to the ruling of the Court on the demurrer.

It is insisted that the replication was bad because it was not sworn to. Whatever may have been the rule under former statutes which are now repealed, it is settled under our present practice that pleadings denying the execution of written instruments are valid without being sworn to. *Vide Magee v. Sanderson*, 10 Ind. R. 261.

No question is raised as to the effect of pleadings in such case, not verified, upon the evidence to be adduced under them.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*M. S. Robinson*, for the appellants.

*J. W. Sansberry*, for the appellee.

CARPENTER *v.* O'NEAL.Nov. Term,  
1859.LITTLE  
*v.*  
VANCE.APPEAL from the *Greene* Circuit Court.

*Per Curiam.*—In this case, there was no motion for a new trial, and the errors assigned relate to errors committed on the trial.

Saturday,  
January 14,  
1860.

The judgment is affirmed with costs.

*O. H. Smith*, for the appellant.*D. M' Donald*, for the appellee.LITTLE and Others *v.* VANCE.APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Complaint to foreclose a mortgage, the installmentments all being due.

Saturday,  
January 14,  
1860.

Answer, that there was a separate agreement in writing that the notes, payable on the face in cash, might be discharged, when they became due, in bonds of a certain railroad company. Demurrer to the answer sustained.

Judgment for the plaintiff; and order that, on failure to pay, &c., so much of the mortgaged premises as might be necessary therefor be sold as lands are sold on execution, to make the judgment, &c.

The demurrer was rightly sustained for two reasons—

1. The written agreement referred to in the answer, or a copy of it, was not filed with the answer.

2. The notes were payable in cash, and the written agreement gave a privilege to discharge them in railroad bonds. It will bear that construction as pleaded, and the ambiguity, if one exists, on account of the instrument not being filed or copied, must operate against the pleader.

See, as to the election to pay in bonds, *Parks v. Marshall*, 10 Ind. R. 20, cited in *Williams v. Jones*, 12 *id.* 561.

The form of the judgment was right.

Nov. Term,  
1859.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

KNOUR  
v.  
DICK.

*R. L. Walpole and K. Ferguson*, for the appellants.  
*J. L. Ketcham and I. Coffin*, for the appellee.

### KNOUR and Others v. DICK.

Except where the code has otherwise provided, mutuality is essential to a set-off.

Saturday,  
January 14,  
1860.

APPEAL from the *Warren* Court of Common Pleas.

WORDEN, J.—*Dick*, the plaintiff below, brought suit against *Knour*, *Hixon*, and *Swank*, on a joint note made by the defendants to the plaintiff. *Knour* pleaded, amongst other things, by way of set-off, a debt due to him from the plaintiff.

A demurrer was sustained to the plea, and the correctness of this ruling is the only question involved in the case.

The decision below on the demurrer, was undoubtedly correct. The debt sought to be set off lacked the essential of mutuality. It was due from the plaintiff to only one of the defendants.

The code of 1852 has not dispensed generally with the necessity of mutuality, in order that one debt may be set off against another. *Blakenship v. Rogers*, 10 Ind. R. 333.

By § 58 of the code it is provided that, "in all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant and against the plaintiff or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant."

In the cases provided for in the foregoing section, mutuality is dispensed with, but that section has no application



to the case at bar. It does not appear that *Knour* was the principal in the note, and the other makers sureties. On the contrary, in another plea, *Knour* alleges that he himself was a mere surety in the note.

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1859.

THE STATE  
v.  
SAUVAINÉ.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*B. F. Gregory* and *J. Harper*, for the appellants.

*R. A. Chandler*, for the appellee.

### LOMAX and Others v. STRANGE.

APPEAL from the *Grant* Court of Common Pleas.

Saturday,  
January 14,  
1860.

*Per Curiam*.—Suit by the appellee against the appellants on a note, and judgment by default. The errors assigned will not be noticed, as no steps were taken in the Court below for the purpose of correcting them. This should have been done if errors were committed, as has frequently been decided at the present term of this Court.

The appeal is dismissed with costs.

*I. Van Devanter* and *J. F. McDowell*, for the appellants.

### THE STATE v. SAUVAINÉ.

Since the act of 1855, the jury cannot acquit a party of costs where they find him guilty.

APPEAL from the *Switzerland* Circuit Court.

Saturday,  
January 14,  
1860.

WORDEN, J.—The appellee was indicted in the Court below for an assault and battery with intent to murder. The jury, on the trial, acquitted him of the intent charged, but found him guilty of the assault and battery, and as-

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1859.

LITTLE  
v.  
VANCE.

essed his fine at 3 dollars, "without costs." The prosecutor moved the Court to render judgment against the defendant for the costs of the prosecution as well as the fine, but the motion was overruled, and it was adjudged by the Court that the defendant pay the fine assessed, but "that as to the costs of this suit, he go hence without day and be discharged."

The judgment as to the costs, was wrong. Since the act of 1855, a jury has not the authority, by their verdict, to acquit a party of costs where they find him guilty; and that part of the verdict must be regarded as surplusage. The defendant being convicted, he was liable for the costs of the prosecution, and judgment should have been rendered accordingly. This point was decided in the case of *The State v. Foster*, 9 Ind. R. 139.

*Per Curiam.*—The judgment discharging the defendant from the costs, is reversed, and the cause remanded with instructions to render judgment as above indicated, with costs in this Court.

*F. Atkinson*, for the state.

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LITTLE and Others v. VANCE.

Saturday,  
January 14,  
1860.

APPEAL from the *Marion* Circuit Court.

*Per Curiam.*—In this case, though there was not service upon, there was an appearance by attorney for, all the defendants.

The judgment is affirmed with 3 per cent. damages and costs.

*R. L. Walpole*, for the appellants.

THE STATE *v.* FARLEY and Others.

Nov. Term,  
1859.

THE STATE  
*v.*  
FARLEY.

14	23
141	115

Indictment as follows: State of *Indiana*, &c. The grand jury, &c., charge that *J. F.* (and twelve others, naming them), on, &c., at, &c., did then and there willfully, purposely, feloniously, and of their malice aforethought, make and perpetrate an assault on the body of *B. M.*, in the peace, &c., and then and there with pistols, guns, rocks and clubs, which they, the said *J. F.*, &c., in their hands then and there had and held, did willfully, feloniously, purposely, and of their malice aforethought, then and there strike, beat, bruise, and wound the said *B. M.*, with intent, &c., to kill and murder her, &c.

*Held*, 1. That the indictment is not double.

2. That it charges all the persons named with using all the weapons mentioned, and is in that regard sufficient.

3. That the assault and battery is sufficiently charged; and that, with proper averments as to intent, is all that is necessary under the statute. The injury done is set forth with sufficient particularity.

APPEAL from the *Putnam* Circuit Court.

Saturday,  
January 14,  
1860.

WORDEN, J.—Indictment against the appellees, as follows, viz.:

“State of *Indiana*, *Putnam* county, sct. *Putnam* Circuit Court, *October* term, 1858. The grand jury of the county of *Putnam*, in the name of, and by the authority of, the state of *Indiana*, charge that *Joseph Farley* (and twelve others, naming them), on the second day of *July*, 1858, at the county of *Putnam* and state of *Indiana* aforesaid, did then and there wilfully, purposely, feloniously, and of their malice aforethought, make and perpetrate an assault on the body of *Barbara Mikel*, in the peace of the state then and there being, and then and there with pistols, guns, rocks, and clubs, which they, the said *Joseph Farley* (and others, naming them), in their hands then and there had and held, did willfully, feloniously, purposely, and of their malice aforethought, then and there strike, beat, bruise, and wound the said *Barbara Mikel*, with intent, in so doing, then and there feloniotisly, willfully, purposely, and of their malice aforethought, to kill and murder her, the said *Barbara Mikel*, contrary,” &c.

On motion of defendants, this indictment was quashed, and the state excepted and appeals to this Court.

The objections made to the indictment by the counsel

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1859.

THE STATE  
v.  
FARLEY.

for the appellees, are, first, that it is double, containing a charge of assault with intent, &c.; and a charge of assault and battery, with intent, &c.; secondly, "that the defendants are *en masse* charged with perpetrating the assault and battery with pistols, guns, rocks, and clubs, without alleging which of the weapons any one of the defendants used;" thirdly, that there is no allegation of the nature of the injury to the person assaulted.

The indictment is clearly not double; that is, it does not charge two separate offenses. It charges an assault and battery with intent to murder; and an assault, or an assault and battery with such intent, constitutes but one offense. 2 R. S. p. 397, § 9.

The second objection is equally groundless. All the defendants are charged with perpetrating the assault and battery with all the weapons named in the indictment. It certainly cannot be objected that there is not enough charged in this respect.

In reference to the last objection, it may be observed that the assault and battery seems to be sufficiently charged; and that, with proper averments as to the intent, is all that seems to be necessary to make out the offense defined by the section of the statute on which the indictment is based. The injury done to the person upon whom the battery was perpetrated is set forth with abundant particularity. It is alleged that the defendants did "strike, beat, bruise, and wound" her, and it seems to us that further particularity is entirely needless.

These are all the objections urged against the indictment, and, in our opinion, they are not well taken.

*Per Curiam.*—The judgment is reversed. Cause remanded, &c.

C. C. Nave, for the state.

J. A. Matson, for the appellees.

NUDD *v.* BURNETT.Nov. Term,  
1859.NUDD  
v.  
BURNETT.

The Courts will not aid a party to rescind or annul an executed illegal contract.

APPEAL from the *Wayne* Court of Common Pleas.

Saturday,  
January 14,  
1860.

HANNA, J.—*Nudd* brought suit and obtained judgment, before a justice of the peace, for 75 dollars, the value of a horse. *Burnett* appealed to the Common Pleas, where he had verdict and judgment in his favor. It appears that the plaintiffs offered a witness to prove “his case,” &c., when, before he had given his testimony, the defendant interposed, and asked him whether a note shown him contained the contract between the parties in regard to said horse, which interrogatory was answered by the witness in the affirmative. The Court thereupon refused to hear any “evidence contradicting or varying the note,” and would not admit evidence offered to prove that on the day of the execution of the note, the defendant took, and has since held, possession of the horse, refused to pay the note or return the horse upon demand made and tender of the note, &c., and the value of said horse, &c.

The note in question is as follows:

“On or before the 25th day of *December* next, we, or either of us, promise to pay to *Edward C. Nudd*, or order, one hundred and fifty dollars, if *James Buchanan* is the next president of the *United States*; and if he is not the next president, then this note is null and void.

“\$150. For value received this 5th day of *September*, 1856.” Signed by the defendant and another.

The errors assigned are in reference to the rulings of the Court in rejecting the evidence offered, &c.

The plaintiff contends that if the contract shown by the note was illegal, he had a right to repudiate it and sue for and recover the horse for which the note was given, or the value thereof. The other party insists that the contract was illegal; that the Court will not lend its aid to enforce

Nov. Term,  
1859.

CLARK  
v.  
THE STATE.

it, or grant any relief, &c., but will leave the parties where they have placed themselves.

We are inclined to the latter view of the case. Here the contract, upon the part of the plaintiff, was executed; that contract was illegal; and the Court should not be made an instrument, in his hands, to enable him to rescind or set at naught such contract, after he has so executed it. This differs from a suit against a stakeholder in this, that in the latter class of cases, the party repudiates before the contract is executed by the delivery, &c., to the other contracting party.

*Per Curiam.*—The judgment is affirmed with costs.

*N. H. Johnson, M. Wilson, and L. Develin*, for the appellant.

*B. F. Claypool*, for the appellee.

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CLARK v. THE STATE.

Saturday,  
January 14,  
1860.

APPEAL from the *Allen* Court of Common Pleas.

PERKINS, J.—Prosecution for the larceny of one 5 dollar bank bill on the bank of *Pittsburgh, Pennsylvania*, of the value of 5 dollars, and four 1 dollar bank bills, of the value of 1 dollar each, on banks to the prosecution unknown.

The defendant was convicted.

The only proof of the genuineness of the bills, and of the existence of the banks on which they purported to be, was the testimony of the person from whom they were stolen, and who appears to have been a business man, that the bills were of the value expressed upon their faces.

It seems to us that this evidence tended to prove the existence of the banks and the genuineness of the bills, and fairly made the facts questions for the jury. These are points not requiring the highest degree of evidence. Lewis' U. S. Crim. Law, 468.—3 Greenl. Ev., § 153.

*Per Curiam.*—The judgment is affirmed with costs.

*W. M. Crane* and *W. S. Smith*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

Nov. Term,  
1859.

THE CITY OF  
EVANSVILLE  
v.  
HALL.

THE CITY OF EVANSVILLE v. HALL.

14	27
140	319

The *situs* of shares in an insurance company, at least for the purpose of taxation, is the domicil of the owner.

Money or capital to be taxable by the city of *Evansville*, must be taxable for county purposes in the county of *Vanderburgh*.

APPEAL from the *Vanderburgh* Circuit Court.

Saturday,  
January 14,  
1860.

WORDEN, J.—*Hall*, the appellee, was a citizen and resident of the town of *Princeton*, in the county of *Gibson*, in the state of *Indiana*, and the owner of one hundred and eighty-five shares of the capital stock of the *Evansville Insurance Company*, located in the city of *Evansville*, in *Vanderburgh* county. He paid state, county, and corporation taxes on the stock in the county of *Gibson*, his residence. At the same time, the city of *Evansville* assessed a corporation tax on the same stock; and the question involved in the case is, whether the tax thus assessed by the city of *Evansville* is legal and valid. It was held by the Court below that the city could not thus assess and collect the tax, and from that decision she appeals to this Court.

Section 35 of the charter of *Evansville* provides that “For the purposes of revenue, the common council shall have power to levy, and cause to be assessed and collected, once in each year, an *ad valorem* tax upon all property, real and personal, within said city; and on all money and capital within said city, which is or may be subject to taxation for county purposes, whether such money or capital be actively employed or not, and on all money bearing interest and payable to any inhabitant of said city,” &c. *Lócal Acts* of 1847, p. 18.

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1859.

THE CITY OF  
EVANSVILLE  
v.  
HALL.

Corporation stock is, perhaps, to be deemed personal property. For the purposes of taxation, it is defined as such by 1 R. S. p. 105, § 5. And if the stock, in this case, is to be considered as "within said city," the city may, undoubtedly, tax it, under the first clause of the section of the charter above quoted. But it seems to us that the stock of the company is not to be deemed within the city, simply because the corporation is located and transacts its business there. Such stocks differ from tangible property that must have an actual location. "Shares in incorporated joint stock companies are not, strictly speaking, chattels; and it has been considered that they bear a greater resemblance to choses in action; or, in other words, they are merely evidence of property. They are, it has been said, mere demands of the dividends as they become due, and differ from movable property, which is capable of possession and manual apprehension." Ang. and Ames on Corp. 316.

We are of opinion that the *situs* of the stocks, in the case at bar, at least for the purposes of taxation, is the domicil of the owner, and cannot be deemed to be within the city. Hence the city cannot levy the tax under the first branch of the section above quoted. This view is supported by what is said in the case of *The Bank, &c. v. The City of New Albany*, 11 Ind. R. 139. Counsel for the city, in their brief, say that the stock "is situated where the company has its principal office, and does its business." The statute on the subject "of listing corporation and public stocks" (1 R. S. p. 113), does not apply to insurance companies, and we know of no other statute on the subject.

But the city is authorized to levy a tax upon "all money and capital within said city, which is, or may be, subject to taxation for county purposes." Admitting that the term "capital," as used in the above section, could be construed to embrace the stocks in question (a proposition which we do not decide), still, in order that the city may tax that capital, it must be taxable for county purposes. We understand the language employed in the city charter



to mean, that the money or capital to be taxed by the city, must be taxable for county purposes in the county of *Vanderburgh*, in which the city is situated.

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1859.

BAUGH  
v.  
THE STATE.

We are of opinion that under the provisions of the act providing for the assessment and collection of taxes (1 R. S. p. 105), particularly the 10th and 23d sections, the stocks in question were taxable for state and county purposes, in the county of *Gibson*, the residence of the appellee, and not in the county of *Vanderburgh*. The 23d section requires the owner to make out a list for taxation, amongst other things, of all "corporation stocks," excepting stocks in the *Indiana State Bank*, and such other stocks as may be specifically taxed. The stocks in question are not specifically taxed, but are taxed as other property, and in the county where the owner resides. It follows that the city of *Evansville* had no authority to levy and collect the tax in question.

*Per Curiam.*—The judgment is affirmed with costs.

*J. G. Jones* and *J. E. Blythe*, for the city.

*S. Hall*, in person.

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BAUGH v. THE STATE.

APPEAL from the *Bartholomew* Court of Common Pleas.

Saturday,  
January 14,  
1860.

PERKINS, J.—Information for keeping a nuisance.

It is contended that there is no statute on which the information can rest. *Ingersoll v. The State*, 11 Ind. R. 464, decides otherwise.

The information charges that "on the first of *March*, 1857, at, &c., *Michael Baugh* erected, and continually from thence hitherto, continued, maintained, and kept," &c.

It is insisted that the Court erred in permitting any evidence of the existence of the nuisance, except on the said first day of *March*. This is frivolous. The information,

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1859.

THE INDIAN-  
APOLIS, &C.,  
RAILROAD CO.

v.  
MEANS.

to the common understanding, plainly enough charges a continuous nuisance. The word "has" may be supplied, if the counsel thinks it will make the pleading more certain.

*Per Curiam.*—The judgment is affirmed with costs.  
*R. Hill*, for the appellant.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY  
v. MEANS.

The simple killing of an animal by the cars of a railroad company, is not *prima facie* evidence of negligence on the part of their employes.

A party cannot have the benefit of the statute of 1853, making railroad companies liable for animals killed without negligence, unless he prove that the road was not fenced as prescribed by the statute.

Saturday,  
January 14,  
1860.

APPEAL from the *Shelby* Court of Common Pleas.

WORDEN, J.—This was an action by the appellee against the company, commenced before a justice of the peace, and appealed to the Common Pleas, where it was tried by the Court and judgment rendered for the plaintiff, over a motion for a new trial.

In the Common Pleas, as well as before the justice, a motion was made by the defendant to dismiss the cause for the want of a sufficient statement of the cause of action, which was overruled. The cause of action is as follows:

"The *Indianapolis Railroad Company* to *Fountain Means*, Dr., to one milch cow killed between *Brookfield* and *London*, in *Shelby* county, *Indiana*, on or about the 4th day of *October*, 1858; said cow worth \$30 00. *December* 11, 1858."

Passing by the fact that this statement of the cause of action purports to be against the *Indianapolis*, and not against the *Indianapolis and Cincinnati* railroad company, it may, on its face, be sufficient. *Vide Milholland v. Pence*,

11 Ind. R. 203. But it would seem that the cause of action sounds in contract, and not in tort. In terms, it makes the defendant the debtor of the plaintiff. Who killed the cow, or how she was killed, does not appear. For aught that appears in the statement, the cow may have been killed by the plaintiff and sold to the defendant for beef, and in this view the cause of action may be sufficient; but it is extremely doubtful whether, under this statement, the plaintiff could introduce evidence of a trespass by the defendant, in killing the cow by the locomotive of the company, upon the railroad track, under such circumstances as would make the defendant liable. But upon these points we shall decide nothing, as the judgment will have to be reversed on other grounds, and when the cause goes back the plaintiff can amend if he sees proper to do so.

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1859.

THE INDIAN-  
APOLIS, &C.,  
RAILROAD CO.  
V.  
MEANS.

The evidence offered wholly fails to make out any case whatever. It shows that the cow was killed upon the railroad track, by the train of the company, about a quarter of a mile from *Brookfield*, but there was no attempt to show any negligence on the part of the company. The simple killing of an animal on a railroad track is not *prima facie* evidence of negligence. *Pierce on Am. Railr. Law*, 357.

Nor was there any proof that the railroad was not fenced. If the plaintiff relies upon the statute making railroad companies liable without negligence, for animals killed upon the road, the same not being fenced, he must, by his proof, bring himself within the provisions of the statute, and show that the road was not fenced as provided for in the statute. *Vide The Indianapolis, &c., Railroad Co. v. Wharton*, 13 Ind. R. 509.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

DAVISON, J., was absent.

J. S. Scobey, for the appellants.

J. B. McFadden and J. Cartmill, for the appellee.

Nov. Term,  
1859.

**BROWN v. PERRY.**

**BROWN**  
**v.**  
**PERRY.**

An answer purporting to go in bar of the whole cause of action, but setting up facts in bar of a part only, is bad on demurrer.

Assumpsit lay to recover the stipulated price due on a special contract not under seal, where the contract had been completely executed, so that only a duty to pay the money remained, and it was not necessary, in such case, to declare upon a special agreement. This rule is applicable to pleadings under the code.

Evidence that the matters for which the suit is brought had been submitted to arbitrators, who had made an award in favor of the plaintiff, is irrelevant under the general issue. An arbitration and award, if relied upon, must be specially pleaded.

Saturday,  
January 14,  
1860.

**APPEAL** from the *Bartholomew* Court of Common Pleas.

WORDEN, J.—Suit by *Perry* against *Brown*. Complaint that defendant owed the plaintiff 100 dollars for house rent and pasturing stock, &c.; also 50 dollars for work done and materials furnished; also 50 dollars for money lent.

Demurrer to complaint overruled.

The defendant, in the fifth paragraph of his answer, pleaded as follows, viz.:

“Said defendant further says that on or about the — day of *September*, 1856, the cattle, horses, and hogs of the said plaintiff and other persons, trespassed upon and damaged the corn of the said defendant to the amount of 100 dollars, and in consideration of said trespass, said plaintiff promised to pay said defendant whatever the damage so done amounted to, which he has failed, and still fails, to do.”

This paragraph was demurred to on the ground, amongst other things, that it did not state facts sufficient to bar the action. The demurrer was sustained. The rulings on the demurrers are assigned for error.

There was no exception taken to the ruling on the demurrer to the complaint, nor is any objection to the complaint pointed out, hence it will be treated as good, although the demurrer to the answer might reach back to it.

The demurrer to the answer was correctly sustained.

14 32  
145 317  
14 32  
158 484  
14 32  
163 520

The answer, if good in other respects, is fatally defective in setting up facts which at most could only bar 100 dollars, in bar of a much larger claim. The plea professes to answer the whole cause of action, but sets up facts that at most would bar only a part. *Rose v. The North River Bank*, 11 Ind. R. 268.—*Conwell v. Finnell*, *id.* 527.

Nov. Term,  
1859.

BROWN  
v.  
PERRY.

The cause was tried by the Court, on the issues formed, and there was a finding and judgment for the plaintiff for 45 dollars, over a motion made by defendant for a new trial.

Two further errors are assigned, viz.: Overruling the motion for a new trial; and rendering judgment for the plaintiff for costs.

It appears by a bill of exceptions that there was a contract between the parties (which does not appear to have been in writing), by which the house rent mentioned in the complaint was to be at the rate of 30 dollars per annum, and that the defendant should have "pasture for his cows and horses at a reasonable rate." It is objected by the appellant that there could be no recovery under the complaint for the house rent and pasturage, because there was a special contract in reference to them, and the complaint is in general assumpsit. This objection is not well taken. For aught that appears, the agreement had been fully executed on the part of the plaintiff. The inference to be drawn from the statements in the bill of exceptions is, that the defendant had occupied the premises for the full time agreed upon, and had had the benefit of the pasturage stipulated for.

"*Indebitatus assumpsit* will lie to recover the stipulated price due on a special contract not under seal, where the contract has been completely executed, so that only a duty to pay the money remains; and it is not necessary, in such case, to declare upon a special agreement." Chit. on Pl., 10 Am. ed., 340, note 3, and authorities there cited. This rule has been recognized as applicable to pleadings under the code. *Kerstetter v. Raymond*, 10 Ind. R. 199.

It further appears by the evidence offered by the plaintiff, that the matters for which the suit was brought had been,

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1859.

BROWN  
v.  
PERRY.

by the agreement of the parties, submitted to arbitrators, who had awarded to the plaintiff the sum of 45 dollars.

The appellant insists that the suit will not lie upon the original causes of action, but that they are merged in the award, upon which alone the suit should have been brought.

It is probable that had the arbitration and award been pleaded by the defendant, the plea would have defeated the action on the original cause, and compelled the plaintiff to count upon the award. But no such plea was filed, nor was any issue formed under which the defendant could avail himself of the defense. The arbitration and award constitute new matter which should have been pleaded specially. "All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." 2 R. S. p. 42, § 66.

The general denial filed in the case does not enable the defendant to avail himself of this defense. "Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove." *Id.*, p. 45, § 91.

The circumstance that these facts appear by the evidence offered by the plaintiff, cannot alter the case. The evidence of the arbitration and award appears to have been entirely irrelevant to the issues, and cannot, we think, either benefit or prejudice either of the parties.

Leaving out of view any evidence as to the award, the finding is abundantly sustained by the evidence. The bill of exceptions shows that the defendant was indebted to the plaintiff in the sum of 20 dollars for money lent; and for the rent of the house, &c., and for pasture for cows and horses, in the sum of 25 dollars, "after deducting all of said defendants credits, offsets, payments, and counter-claims proven in the action," making the whole amount due the plaintiff, after making the deductions mentioned, the sum of 45 dollars.

No point is made in the brief of counsel as to the judgment against the appellant for costs, therefore the error assigned in that respect, will not be further noticed.

We find no error in the proceedings requiring a reversal of the judgment.

Nov. Term,  
1859.

*Per Curiam.*—The judgment is affirmed with 10 per cent. damages and costs.

HOWARD  
v.  
BURKE.

*R. Hill*, for the appellant.

*W. Singleton*, for the appellee.

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HOWARD v. BURKE.

A bill of exceptions filed after term without leave, is no part of the record.

APPEAL from the *Decatur* Court of Common Pleas.

Saturday,  
January 14,  
1860.

WORDEN, J.—Action of repleven for twenty hogs, by the appellant against the appellee. Trial by jury and verdict for defendant. The plaintiff moved for a new trial, on the ground that the Court gave improper, and refused proper instructions to the jury. The motion was overruled and judgment entered on the verdict. The correctness of the instructions given and refused, presents the only question in the case.

The instructions refused, and those given, are not properly before us. They form, in this case, no part of the record. They are not made a part of the record in the manner provided for in § 324 of the code, nor are exceptions taken in the manner provided for in the following section. They do not indeed appear in the record at all. They are contained in a bill of exceptions which was filed in the vacation of the Court, after the term at which the proceedings were had. This bill of exceptions is entirely unavailing, and cannot be deemed a part of the record.

The statute provides that “time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the Court. 2 R. S. p. 115, § 343. Here no “special leave” to file the bill after the term, appears to have been obtained, and a bill filed after the term without

Nov. Term,  
1859.

KEELY  
v.  
THE STATE.

such leave, cannot be deemed a part of the record of the cause.—*Lawton v. Swihart*, 10 Ind. R. 562.

*Per Curiam*.—The judgment is affirmed with costs.

*W. Cumback*, for the appellant.

*J. Gavin* and *O. B. Hord*, for the appellee.

### KEELY v. THE STATE.

By our statute, larceny consists in the feloniously stealing and taking away the personal goods of another. The general doctrine is, that the felonious quality consists in an intent to defraud the owner for the use and benefit of the thief; but there may be larceny without anticipated benefit to the thief. The felonious intent must exist at the time of the taking.

An application for a new trial, in order to obtain evidence, based upon the fact that the witness was a railroad hand, and the party did not know where to send for him or his deposition, for the trial had, is within the case of *Gibson v. The State*, 9 Ind. R. 264.

Saturday,  
January 31,  
1860.

APPEAL from the *Marion* Court of Common Pleas.

PERKINS, J.—Prosecution in the Common Pleas for larceny. Conviction, and sentence for two years to the state prison.

The evidence was substantially as follows:

On the night of the 19th of *October*, 1859, *Keely* the appellant, and *Kerr* and *Radcliff*, were at the house of one *Josephine Hudson*, in *Indianapolis*, a house of ill-fame of the worst character. *Keely* and *Radcliff* had drunk to excess. *Radcliff*, before the party proposed to leave the house, became dead drunk, so that he could not be aroused, and *Keely* and *Kerr* departed, leaving him lying senseless on the floor. About an hour afterwards *Keely* returned and again made an attempt to arouse *Radcliff* and take him away, but was still unable to accomplish his purpose. He then informed *Josephine Hudson* that he would take *Radcliff's* pocket-book and keep it till morning, when he would give it to him or his friends for him. *Josephine* objected, and tried to prevent *Keely's* taking the pocket-book.



A long struggle ensued over the body of *Radcliff*, which resulted in *Keely* obtaining the pocket-book, and in the partial awakening of *Radcliff*. *Josephine* then informed him that *Keely* had taken his money, but *Keely* denied it. Loud talk followed; several other persons were in and about the house, among them two policemen, who were attracted to the disputing parties; *Keely* denied to them all that he had the pocket-book, and started for home. The policemen followed and overtook him; he told them he had the pocket-book, and gave it to them. They thereupon threw him into jail for larceny.

Nov. Term,  
1859.

KEELY  
v.  
THE STATE.

By our statute, larceny consists in the feloniously stealing and taking away the personal goods of another. 2 R. S. p. 403. The felonious quality consists in an intent to defraud the owner for the use and benefit of the thief. Such is the general doctrine; but there may be larceny without anticipated benefit to the thief. To constitute larceny under the statute, the felonious intent must exist at the time of the taking. 4 Wend. Blacks. 321, note.—2 Wat. Archb. 366, 337, note.

The case of *Norton v. The State*, 4 Mo. R. 461, was decided upon a statute of that state making bailees, who fraudulently converted goods bailed, &c., guilty of larceny. See, also, as to the *English* embezzlement act, 1 Wend. Blacks. 428, note 16.

In the case at bar, it is difficult to discover in the evidence, proof of a felonious intent at the taking. It would rather seem that the intent was to prevent the property from being stolen, as, if not taken by a friend, it undoubtedly would have been by others. The only evidence tending to show a felonious intent, is the denial afterwards that he had the pocket-book. But it is not unreasonable to suppose that *Keely* well perceived that if the pocket-book was returned to *Radcliff*, or given to *Josephine*, or others about the house, it would hardly escape the fate of larceny before morning, and that his best way to secure it for *Radcliff* when he should become himself, and get out of bad company, would be to deny that he had the pocket-book and hurry home with it.

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1859.

BACOT  
v.  
BACOT.

How could such a denial have been serious, when he had taken the pocket-book openly, and with an announcement of the purpose with which he took it? Which act is to be regarded as most expressive of intention?

But we do not propose to decide the case upon the evidence.

The defendant applied for a new trial in order that he might obtain the evidence of *Kerr*, that he (*Keely*) had gone back at his (*Kerr's*) suggestion, to take *Radcliff's* pocket-book, *Kerr* knowing that there was money in it. *Kerr* was a railroad hand, and *Keely* did not know where to send for him or his deposition for the trial had. His application brings him within the case of *Gibson v. The State*, 9 Ind. R. 264.

*Per Curiam*.—The judgment is reversed. Cause remanded, &c.

*H. O'Neal*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

#### BACOT v. BACOT.

Friday,  
March 9,  
1860.

APPEAL from the *Elkhart* Circuit Court.

*Per Curiam*.—No exceptions having been taken on the trial of this cause, the judgment must be affirmed.

The judgment is affirmed with costs.

*J. L. Ketcham* and *I. Coffin*, for the appellant.

*A. A. Hammond*, *J. E. McDonald*, and *A. L. Roache*, for the appellee.

McCORKLE v. THE STATE.

Nov. Term,  
1859.

McCORKLE  
v.  
THE STATE.

14	39
151	398
14	39
168	311
168	313

Where a defendant, to obviate the necessity of returning the indictment to the grand jury for a correction of the date at which the offense was laid as having been committed, consented to the correction in open Court, and to a waiver of record of all objection, and then pleaded to the indictment, and afterwards moved to quash on account of the correction, it was *held*, that the motion was correctly overruled.

The discharge of a jury in possession of a criminal cause upon a valid indictment, not called for by imperious necessity, and without the consent of the defendant, operates as an acquittal, and bars another trial; but, as a general rule, such discharge, with the consent of the defendant, is not a bar.

Such discharge, in the court-house, in presence of the officers of the Court, the defendant, and his counsel, entered of record by the defendant's consent, in pursuance of the consent of the Court previously given in session, is not a bar, though the judge be absent at the time; and the record of the discharge, and of the manner of it, cannot be contradicted on a subsequent trial.

PERKINS, J.—The consent of the Court to the discharge, is not necessary.

A verdict may be returned on *Sunday*; and the Court may sit on that day to receive it, and to receive any motion or order touching it, and the discharge of the jury rendering it.

Error cannot be assigned upon the ruling on an application for a change of venue.

The Courts will scarcely tolerate a second application on the same ground, at the same term, for a continuance.

The defendant, in a criminal case, may waive his right to be present when the witnesses are examined; and if he voluntarily absent himself without leave, he will be deemed to have done so.

In this case, the defendant and his counsel having absented themselves, the Court issued a bench-warrant for the defendant, and after appointing counsel for the defendant, proceeded to the examination of witnesses in his absence. *Held*, that there was no error.

The exact sums laid in an indictment for larceny as having been stolen, need not be proved.

Where, upon the return of the verdict, it is explained to the prisoner, and he moves for a new trial and in arrest, and is fully heard upon the motions, he cannot object on appeal that he was not asked what he had to say why judgment should not be pronounced.

If the defendant and his counsel, in a criminal case, voluntarily absent themselves for the purpose of defeating a trial, he cannot complain that his case was prejudiced with the jury by such absence.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—*James A. McCorkle* was indicted in the *Wayne* Circuit Court for larceny. On being arraigned, he moved to quash the indictment on account of the date at

Tuesday,  
May 15,  
1860.

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1859.

McCORKLE  
v.  
THE STATE.

which the offense was laid as having been committed; whereupon the state proposed to return the indictment to the grand jury for correction. To obviate the necessity for such return, the defendant withdrew his motion to quash, and consented to a correction, in open Court, of the mistake in the date, and to an entry of record of a waiver of all objection, and pleaded not guilty to the indictment.

At a subsequent stage of the proceedings, he renewed his motion to quash, on account of such correction in the indictment. The motion was correctly overruled.

The cause was given to the jury impaneled to try it. After they had been out about two days, the Court standing open and unadjourned, the judge informed the counsel, while all parties were in Court waiting upon the action of the jury, that the jury might be discharged without giving a verdict, they not being able to agree, whenever the defendant should consent to such discharge. This was sometime in the day on *Sunday*. Between seven and eight o'clock in the evening of the same day, the bailiff brought the jury into the court-room, the judge being at the time six miles distant, but the clerk, the counsel, and the defendant being personally present, and the jury reporting that they could not agree, the defendant and his counsel consented that they should be discharged without giving a verdict, and they were accordingly discharged, and the discharge entered of record, with the consent, pursuant to the previous permission of the Court.

On a subsequent day in the term, the defendant moved to be released from his recognizance, and from further prosecution, on the ground that the discharge of the jury, under the circumstances above related, operated as an acquittal, and precluded another trial upon the pending indictment; but the motion was overruled.

The law is well settled that, the discharge of a jury in possession of a criminal cause, upon a valid indictment, not called for by imperious necessity, and without the consent of the defendant, operates as an acquittal, and bars a further trial. Ind. Dig., p. 362, § 12.

Equally well is it established, as a general proposition,

that such discharge with the consent of the defendant, is not a bar to another trial for the same offense. This is conceded in the Courts of *Pennsylvania*, where the most rigid doctrines on this subject are held. In *Peiffer v. The Commonwealth*, 15 Penn. St. R. 468, Chief Justice GIBSON draws a distinction between a consent to the separation of the jury during the progress of the trial, and their final discharge without rendering a verdict. He says: "In this case the jury were allowed to separate after they were impaneled and sworn. True, that took place with the prisoner's consent; but there is right reason and sound sense in Chief Justice ABBOTT's remark in *Rex v. Walfe*, that he ought not to be asked to consent. Who dare refuse to consent when the accommodation of those in whose hands are the issues of his life or death, is involved in the question? He would have to calculate the chances of irritation, from being annoyed on the one hand, or of tampering on the other. The law is undoubtedly settled by precedent, that a prisoner's consent to the discharge of a previous jury, is an answer to a plea of former acquittal, but the instant a jury is discharged, the prisoner's life is no longer in their power; or, if he should be the cause of their being sent back to protracted confinement, the value of a single chance in his wretched condition would disarm their resentment."

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McCORKLE  
v.  
THE STATE.

But it should be here observed that, in this state, it is the uniform practice to allow the jury in a criminal, as well as in a civil cause, to separate, with the consent of parties, during the progress of the trial. *Evans v. The State*, 7 Ind. R. 271.

Conceding, however, that the consent of the defendant will prevent the discharge of the jury from operating as an acquittal, the question arises where and how must that consent be given? Counsel say, only in the presence of the Court. In this we cannot concur. It is our unanimous opinion that a discharge in the court-house, in presence of the officers of the Court, the defendant, and his counsel, entered of record by the defendant's consent, in pursuance of the consent of the Court, previously given in

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THE STATE.

session, is such a consent as will prevent the discharge operating as a bar to another trial; and that the record of the discharge, and the manner of it, cannot be contradicted on a subsequent trial.

This is conclusive of the point in the case at bar. But the writer of this opinion, speaking only for himself on this single topic, goes further. He does not think the permission of the Court to discharge, necessary.

After the jury have retired in possession of the cause, the Court can have no communication with them during their deliberations. *Hall v. The State*, 8 Ind. R. 439. It is the duty of the bailiff having them in charge, to keep them in close confinement till they have agreed upon a verdict, no inevitable accident preventing. The Court cannot permit him to discharge them, nor compel the defendant to do so. It is solely a matter in the power and discretion of the defendant himself, so far as his consent is concerned. The discharge need not necessarily take place upon, but it cannot except by, his consent. And whenever he announces his willingness that the jury may be discharged without giving a verdict, and the discharge takes place upon that announcement, whether by the bailiff or the Court, or both in concert, the defendant is estopped to claim the discharge as an acquittal. The question is one of fact, in such a case, in relation to the expressed consent of the defendant, given with the view to the discharge of the jury in pursuance of such consent, whereby he agrees, having calculated the chances, to waive the present and try a future chance for acquittal. It is the every-day practice for the jury, during term time, to return their verdict to the clerk in the temporary absence of the Court. See *Wright v. The State*, 11 Ind. R. 569. Now, suppose when the bailiff brings in the jury, in such absence of the Court, instead of handing up a verdict they should announce, the defendant and his counsel being present, that they had not agreed, and could not agree, upon a verdict, and the defendant should then request that they be discharged from the further consideration of the cause, and the bailiff shall thereupon comply with the request.

Would the defendant be heard in making a claim that such discharge was an acquittal? We think not.

Nov. Term,  
1859.

In regard to the degree of formality with which consent must be expressed, we need not here inquire; for in this case the highest degree characterized it. It was given in the presence, and with the approbation, of the prisoner's counsel, and solemnly entered upon the record of the Court.

McCORKLE  
V.  
THE STATE.

In most cases, acquiescence, with knowledge, and without objection, estops a party to deny consent to the various steps taken during the progress of the trial of a cause. *Burton v. Ehrlich*, 15 Penn. St. R. 236.—2 Wat. Grah. on New Trials, 195.—*Romaine v. The State*, 7 Ind. R. 63.

We here express no opinion as to whether this rule would be extended to the discharge of a jury.

It is further objected that the transactions in this cause occurred on *Sunday*; but the law allows a verdict to be returned on that day, and, as an incident, authorizes the Court to sit on that day to receive it, and to receive any motion or order touching it, and the discharge of the jury rendering it.

At a subsequent term, the defendant was again brought up for trial. He made two successive applications for a change of venue, the first of which was granted, the second, denied. Error cannot be assigned on these rulings. Perk. Pr. 60.

He applied for a continuance. It was denied. He repeated the application on the same ground, upon a second affidavit. It was denied.

Courts, on account of the temptation thus held out to perjury, will scarcely tolerate a second application, on the same ground, at the same term, for a continuance. Perk. Pr. 257. See *Kirby v. Cannon*, 9 Ind. R. 371. The ground in this case was the absence of a witness. But the second affidavit was clearly insufficient, as was the first, because it failed to show due diligence; and it did show that the facts expected to be proved by the absent witness could be proved by other witnesses, if they existed; and we may

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presume that it appeared to the Court, on the motion for a new trial, that they had been proved if they could be.

The foregoing motions having been disposed of below, the remainder of the day was consumed in impanneling a jury. The jury being sworn and charged, the Court adjourned. At the meeting of the Court on the following day, after the reading of the minutes, hearing of motions, &c., the cause was called up, the jury being in the box, but the defendant was discovered to be not present; whereupon his counsel, *G. W.* and *J. B. Julian*, Esqrs., arose and announced to the Court that the defendant was not, and would not be present, and the Court had nothing to do but to discharge the jury and terminate the trial. They then withdrew from the cause, and left the court-house. The Court thereupon issued a bench-warrant for the defendant (See 2 R. S. p. 378, § 125), appointed counsel to act in his behalf, and proceeded with the trial. On the following morning the defendant resumed his place at the bar, accompanied by the Hon. *C. B. Smith*, as counsel, who acted with Hon. *W. P. Benton* and *Michael Wilson*, Esqr., those appointed by the Court, and the examination of witnesses proceeded. No application was made for the reëxamination, in course, of the witnesses who had been examined, but the parties called such as they chose to, and the examination of no one was refused. The cause was given to the jury at the hour for supper, and the jury returned a verdict of guilty, after some two hours' deliberation. The verdict was read by the Court, the defendant being present, who thereupon interposed a motion for a new trial, and prepared written reasons why it should be granted, and the Court adjourned.

On the following morning, the motion for a new trial was argued and overruled, as was also a motion in arrest, and judgment pronounced upon the verdict. It is assigned for error that the Court erred in proceeding with the trial during the absence of the defendant.

The constitution and laws provide that a defendant in a criminal case shall be present at his trial. This is for a two-fold object—



1. That the defendant may have the opportunity of meeting the witnesses and jury face to face, and of directing the course of his trial.

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2. That the state may be in possession of his person so that judgment may be executed thereon.

Now, the question is, are not these provisions, so far as they are in favor of the defendant, designed to confer a privilege which he may waive? He can waive a trial altogether, and plead guilty. He can waive the constitutional and legal privilege of trial by jury. He can waive the constitutional and legal privilege of being a second time put in jeopardy. And shall it be said that he cannot waive his privilege of being present when his witnesses are examined, or any one of them? Then did he, as a question of fact, make such waiver in this case? If he had voluntarily arisen in Court and asked to be absent in the custody of an officer or otherwise, for a period of time, requesting that the trial should proceed in his absence, the waiver would be clear. But how does such a step differ, in substance, from a voluntary departure without asking that the trial shall stop? In one case the consent is vocally, in the other, tacitly, but equally clearly, expressed.

In *The Commonwealth v. Stowell*, 9 Met. 572, the Court say, in reference to an erroneous ruling on the trial below, that as the defendant had an opportunity, but failed to avail himself of it on the trial, of making his objection, his acquiescence was a waiver, and estopped him to raise it afterwards.

In *Mullinix v. The State*, 10 Ind. R. 5, a capital case, the prisoner was held to have waived errors below by silent acquiescence, was not heard upon them in this Court, and was executed.

We are forced to the conclusion, then, that the assignment of error we are now considering, cannot avail the appellant.

Indeed, the common-law practice does not seem to have been materially departed from in this case.

In *Rex v. Streek*, 12 Eng. Com. Law R. 195, a prosecution for an assault with intent to commit a rape, the pri-

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soner fainted during the examination of the prosecuting witness, and was borne out of Court. The trial proceeded for a time in his absence, when PARK, J., doubted if he could go on in the prisoner's absence, he not being in a situation to consent; and the Court being in doubt whether his counsel, without his authority, could consent for him, adjourned. When the prisoner had recovered, the trial was resumed, and PARK, J., said the prosecuting witness should be examined again if either party desired it, but her reëxamination was waived, and the trial proceeded to a conviction of the defendant.

We proceed to another point.

The indictment in this case was for grand larceny, and charged, with proper description, the stealing, at the date of the indictment, of 3,000 dollars of current bank notes, 2,000 dollars in gold coin, and 1,000 dollars of silver coin. The evidence tended to prove a succession of acts of larceny, whereby an aggregate of between 15,000 and 20,000 dollars was, in all, abstracted from the bank in which the thefts were perpetrated.

The Court charged the jury that if they believed, beyond a reasonable doubt, that the defendant, by any one act of theft, within, &c., feloniously stole, &c., an amount of the bills and coin charged, or of either singly, of the value of 5 dollars or upwards, they might find him guilty of grand larceny; if of less than the value of 5 dollars, of petit larceny. The jury found him guilty of grand larceny. It is contended that the state was bound to prove a larceny of the exact sums named in the indictment, or fail entirely in the prosecution. We do not think so, and have no doubt that the instruction expressed the law. See 2 Wat. Grah. on New Trials, 55.

It is assigned for error, that the Court did not, in proceeding to pass judgment upon the verdict, explain to the prisoner its contents, and ask him what he had to say why judgment should not be pronounced, as required by 2 R. S. p. 378, § 126. But, in this case, it appears that the verdict was explained to the defendant, and that, through his counsel, he said much upon his motions for a new trial and

in arrest, against the rendition of judgment. He made no objection below that he had not been sufficiently heard; and where the prisoner speaks without being asked, we take it that the necessity of asking is superseded. The section can have application where the defendant, on the return of the verdict, takes no steps, and judgment passes immediately thereon.

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Another point was made. It was urged that the absence of the defendant and his counsel during a part of the trial, under the circumstances attending it, prejudiced his case with the jury. This is likely; but that absence was voluntary and deliberate, and manifestly for the no very worthy object of defeating a trial and baffling the administration of justice. The consequences were defiantly sought and accepted; they should now be silently borne.

*Per Curiam.*—The judgment is affirmed with costs.

*C. B. Smith, W. P. Benton, W. J. Smith, J. B. Julian, and M. Wilson,* for the appellant.

*J. E. McDonald,* Attorney General, for the state.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1859, IN THE FORTY-  
FOURTH YEAR OF THE STATE, BUT HELD BACK ON PE-  
TITIONS FOR A REHEARING, WHICH HAVE BEEN OVER-  
RULED.

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BARTON and Another *v.* SIMMONS.\*

A person sold land, and agreed to receive in payment certain railroad stock, at a rate which the vendee represented it to be worth in the market. The vendor gave the vendee ten days to procure the necessary amount of stock, and having received the stock within that time, he delivered a deed. Nineteen months afterwards, having ascertained the stock to be worth less than the vendee represented to be its value, the vendor brought suit to rescind the contract, &c. *Held*, that he was too late, even if he could, at any time, have made a case for rescission.

APPEAL from the *Madison* Circuit Court.

HANNA, J.—*Simmons* avers in his complaint that in *December*, 1854, he was the owner of certain described lots and land in *Madison* county, of the value of 3,000 dollars;

*Monday,*  
*November 28.*

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\* A petition for a rehearing of this case was filed on the 18th of *January*, and overruled on the 3d of *May*, 1860.

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that one of said defendants, *William Barton*, then offered him 5,000 dollars for said lands, &c., payable in the capital stock of the *Cincinnati and Chicago Railroad*, representing the same to be of the value of fifty cents on the dollar; that said plaintiff was wholly ignorant of the value of said stock, and so informed said *William*, but relying upon the honesty and candor of said *William*, and the representations so made, said plaintiff offered to take 6,000 dollars in said stock for said lands, &c.; that a contract was then made by which plaintiff executed a deed for said lands, &c., and placed it in the hands of a friend to be delivered to said *William*, if, in ten days, he should procure and deliver said amount of stock; that before the expiration of said time, he did deliver said stock and receive said deed; that said *William* was a merchant, and often at *Cincinnati*, and, therefore, had a good opportunity of knowing the value of said stock; that plaintiff lived in an obscure part of said county, and did not know the value of said stock; that said stock was then of the value only of five to seven cents on the dollar, which was known to the said *William*, but he fraudulently represented otherwise; that it continued of that low value until *July*, 1856, at which time plaintiff, for the first time, made inquiry as to and ascertained its real value, having theretofore confidently rested upon the representations of the said *William* as true, and having been engrossed in his business of farming; that immediately, upon so learning the true value of said stock, he tendered the same to said *William*, and demanded a reconveyance of said real estate, which was refused; that said *William* thereupon fraudulently conveyed said lands to his co-defendant, his father, who had full notice, and received the same without paying any consideration therefor," &c.

There was a demurrer to the complaint, because it did not state facts sufficient, &c.

The demurrer was overruled, which ruling presents the first point for our consideration.

The demurrer should have been sustained. No sufficient excuse is shown for the delay in making the appli-

cation to rescind, if any good reason ever existed for a rescission of the contract. It is not clear that the representations charged to have been made by the defendant, relative to the value of the stock, were such as the plaintiff had a right to rely upon; even if the contract had been consummated without delay; but where a delay of ten days intervened between the time the parties agreed upon terms, and the completion of that agreement, we are not able to perceive that the ends of justice would be subserved by holding that one party might fold his arms and declare that he would rest upon the representations made by the other, in reference to a matter equally open and within the reach of the reasonably diligent inquiry of each. *Cronk v. Cole*, 10 Ind. R. 485.

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But passing by that point, we are clear that the circumstances are such that the plaintiff ought to have informed himself in less than nineteen months after the contract, and taken immediate steps, based upon such information, to get rid of the contract. If he saw proper to negligently fail to investigate matters thus affecting his rights and interest, the law does not protect him in such negligence, but is for the diligent. Whether stocks are such marketable commodities as to bring a contract, in reference thereto, within the principle laid down in 10 Ind. R. *supra*, is a point we need not decide; for it is clear that with the exercise of reasonable diligence, a delay of nineteen months ought not to have intervened before the value could have been discovered. The defendant did not occupy any relation towards the plaintiff, or the road, that would justify the plaintiff in reposing peculiar or extraordinary confidence in his representations. *Hugh v. Richardson*, 3 Story, 639.—*Foley v. Cowgill*, 5 Blackf. 18.—31 Maine R. 143.—*Gatling v. Newell*, 9 Ind. R. 572, 581.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. Grose* and *W. Z. Stuart*, for the appellants.

*D. Kilgore* and *J. Davis*, for the appellee.

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An indictment will not be quashed because found at an adjourned term of the Circuit Court.

An accessory before the fact may be indicted and tried before the principal; but the indictment must aver the commission of the offense by the principal. The indictment in this case contains that averment. See opinion.

It is necessary, in an indictment charging an offense committed without the statute of limitations, to show by averments that the case falls within the exceptions of the statute.

The time of absence from the state or of concealment, of the defendant, which may occur during the period of limitation fixed by the statute, must be added to that period.

*Quære*, how the clause of the statute in relation to the concealment of the criminal, is to be construed.

The jury may convict upon the testimony of an accomplice.

Friday,  
December 2.

APPEAL from the *Lagrange* Circuit Court.

PERKINS, J.—Indictment, conviction, and sentence to the state prison.

The indictment is in these words:

"State of *Indiana*, *Lagrange* county, ss.

"State of *Indiana* v. *George T. Ulmer*.

"In the *Lagrange* Circuit Court, *October* term, *A. D.* 1858, adjourned to *January*, *A. D.* 1859.

"The grand jurors of the state of *Indiana*, duly impaneled, sworn, and charged, in said Court, at said term, to inquire within and for the body of said county of *Lagrange*, upon their oath present and charge that one *Asa Crape* and one *William Jones*, late of said county, on the 12th day of *September*, in the year of our Lord eighteen hundred and fifty-six, at and in the county of *Lagrange* aforesaid, two horses of the value of one hundred dollars each, and one horse, commonly called a gelding, of the value of one hundred dollars, the personal goods and chattels of one *Ralph Selby*, then and there being found, did unlawfully and feloniously steal, take, lead, ride, and drive away, contrary to the form of the statute in such case

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\* A petition for a rehearing of this case was filed on the 11th of *January*, and overruled on the 1st of *May*, 1860.



made and provided, and against the peace and dignity of the state of *Indiana*. Nov. Term,  
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“And the said grand jurors further present and charge that *George T. Ulmer*, late of the county aforesaid, before the committing of the felony and larceny aforesaid, to-wit, on the 10th day of *September*, in the year last aforesaid, at and in the county of *Lagrange* aforesaid, did unlawfully and feloniously incite, move, procure, encourage, counsel, hire, and command the said *Asa Crape* and the said *William Jones*, to do and commit the said felony and larceny in manner and form aforesaid. ULMER  
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“And the said grand jurors do further present and charge that the said *George T. Ulmer*, at and from the day and year last aforesaid, did conceal the fact of said crime and offense by him committed in manner and form as aforesaid, for the period and time of one year from and after the commission thereof by him, to-wit, on and from the 10th day of *September*, A. D. eighteen hundred and fifty-six, to the 10th day of *September*, eighteen hundred and fifty-seven.

“And the said grand jurors do further present and charge that the said *George T. Ulmer*, after the commission of said offense by him committed as aforesaid, has been absent from the state of *Indiana* aforesaid for the period and time of five months, to-wit, from the thirtieth day of *January*, A. D. eighteen hundred and fifty-eight, to the first day of *July*, A. D. eighteen hundred and fifty-eight; and that the said *George T. Ulmer* has concealed himself so that process could not be served upon him for the period and time of five months after the commission of said offense by him committed as aforesaid.

“And so the jurors upon their oaths aforesaid do say and charge that the said *George T. Ulmer* did commit the crime aforesaid, in manner and form aforesaid, contrary to the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.

“*Robert Parrott*,

“Special Prosecuting Attorney.”

This indictment was found at an adjourned term of the

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*Lagrange* Circuit Court; and it is contended that for that reason it should have been quashed; but we think otherwise.

It is provided by an act of 1855 (Acts of 1855, p. 70), "that if at the close of any term of the Circuit Court of any county, or when it shall become necessary or proper for said Court to adjourn from any cause, the business pending therein shall not be finished, it shall be lawful for such Court to adjourn until some other certain time, to be specified in the adjourning order, of which public notice shall be given in some manner, to be specified by said Court; and at such time, such Court shall meet and continue in session so long as the business shall require, and such adjourned session shall be deemed a part of the regular term of such Court."

And the 2 R. S. p. 363, provides that "whenever the grand jury is dismissed before the final adjournment, they may be summoned to attend again at the same time, if necessary; and if a full jury do not attend, the number may be completed from the bystanders."

It thus appears that criminal business may arise, and be taken cognizance of, at any time during the term; and, whenever it does so arise, may be treated as unfinished business of the term. This construction violates no rule of law, and tends to promote speedy trials of persons accused of crime—a result called for alike by the interest of the accused, and the public policy of the state.

It is claimed that the allegations in the indictment are insufficient. *Ulmer* is indicted as an accessory before the fact. He may be thus indicted and tried, before the indictment and conviction of the principal. 2 R. S. pp. 422, 423. But the indictment against the accessory must aver the commission of the offense by the principal, as well as the counseling of it by the accessory. It is insisted that the indictment in this case does not contain such averments, but we think it does. 1 Arch. Crim. Pl., p. 16. The time at which the offense is charged in the indictment to have been committed is without the statute of limitations; but the case is alleged, and shown by

averments, to fall within the exceptions in the statute. This is necessary in indictments, because, in criminal cases, the defendant may avail himself of the statute of limitations without pleading it. Ind. Dig., p. 364, § 31.—  
 Whart. Crim. Law, 4th ed., § 445.

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And the only remaining point to be decided in the case is, the construction to be given to the exceptions in that statute in this state. The statute, with the exceptions, is found on pp. 362, 363, 2 R. S., and provides that for treason, murder, arson, and manslaughter, there shall be no limitation; for offenses punishable by fine not exceeding three dollars, the limitation shall be sixty days, and for all other offenses, two years. But § 13 further provides that, "if any person who has committed an offense, is absent from the state, or so conceals himself that process cannot be served on him, or conceals the fact of the crime, the time of absence or concealment is not to be included in computing the period of limitation."

Upon this statute, the counsel for the defendant below argues thus:

"The statute of limitations contains three exceptions. The first exception applies to a person who, being without the state, commits an offense by an agent, or otherwise within the state, and it applies to no other case. The evidence in the record proves that *Ulmer*, at the time of the commission of the crime, was in this county and state. The second exception is equally unsustained by the evidence. *Selby* swears that '*Ulmer* was missing from the neighborhood about a year ago.' *Bevington* swears '*Ulmer* went away some time in last *January*. \* \* \* I was not in the county when *Ulmer* went away; *Ulmer* told me in jail that he left about the 22d of last *January*; he said there was great excitement, and he left home for the reason that if they attempted to arrest him, life would be taken; that he heard a mob was coming to take him; that he intended to come home as soon as he could safely do so.' The above, selected from the whole record, is the only evidence on this point; it shows that some seventeen months after the larceny, *Ulmer* left his family and the

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state for some five months; that he left not to avoid process, but he left to avoid being taken by a mob. It does not prove, or tend to prove, that he even attempted to conceal himself to avoid the service of process. Thus far as to these two exceptions in the statute, (without regard to whether the indictment be good or bad), the evidence does not make out a case under either of them. As to the first, as above stated, the evidence proves that *Ulmer* was in the state at the time the act was done. As to the second, there is no evidence even tending to prove the allegation that he concealed himself. But as to these two exceptions, the indictment is bad; it shows on its face that the statute had been running some sixteen months before *Ulmer* left the state; and the evidence shows that he and his family resided in this county for the last five years, and up to the time of the trial; that defendant, during that time, had been absent about five months under the circumstances, and for the purpose above stated. *Hern* swears that *Ulmer* has lived on *Pretty Prairie*, in this county, for some five or six years past. As to both of these exceptions, it is plain from the indictment, and also from the evidence, that the statute had been running some sixteen months, and the law is well settled, that 'when once the statute has begun to run, nothing stops its course.' See 4 Taunt. 516, 826."

We think the counsel wrong in his construction of the statute. The language is, "who has committed," not who commits. We admit that under the *English* statute of limitations in civil cases, and under those of *Indiana*, prior to 1843, when the statute once commenced running it continued. This was the legal effect of a fair construction of the language of the statute. For example, that of this state of 1838, provided that "on all contracts," &c., "if the defendant shall be without the state when the cause of action accrued," &c. But in 1843, the phraseology of the statute was changed. The code of that year provides, p. 687, § 110, that "if, after any cause of action shall have accrued, the person," &c., "shall be absent," &c.; and such is substantially the language of the code of 1852, touching

civil actions. See 2 R. S. p. 77, § 216. The rule as to time, is, by the language of the statute, made the same in case of absence, as in that of concealment.

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The provisions of the limitations of civil and criminal actions in our present code are very similar, and, we have no doubt, should both receive, on this point—that is, as to the absence being at the time, or after the act—the same construction. The time of absence from the state, of the defendant, or of his concealment, which may occur during the period of limitation fixed by the statute, must be added to that period. With such addition, the prosecution in this case is shown by the indictment, and was proved on the trial to be in time. See Whart. Crim. Law, 4th ed., § 445. The clause in relation to the concealment of the crime was doubtless suggested by that touching the concealment of a cause of action, but how it is to be construed, who can tell? There is no analogy between civil and criminal cases in this particular. Must there be a positive act of concealment, and must it relate to the crime, not to the person committing it?

The jury may convict upon the testimony of an accomplice. Ind. Dig., tit. Accomplice.

*Per Curiam*.—The judgment is affirmed with costs.

*A. Ellison*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

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### TOWNSEND and Others v. McIntosh and Others.\*

Where, in a proceeding in chancery under the former practice, there was no exception to the answer of heirs who were made parties in lieu of their deceased parent, and no other means was resorted to to test its sufficiency, but a replication was filed taking issue upon it, it was *held* that no objection could be raised in the Supreme Court on account of any variance between the answer of the original defendant and that of the heirs.

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\* A petition for a rehearing of this case was filed on the 4th of *January*, and overruled on the 3d of *May*, 1860.

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v.  
McINTOSH.

It was a rule of evidence in chancery proceedings, that the answer of one through whom others claim must be taken, as against them, to be *prima facie* true.

Under this rule, the answer of one through whom others claim would be considered as evidence against them, so far as the facts stated were relevant to the issues made upon their answer.

The complainant in chancery cannot introduce evidence tending to contradict a positive averment or charge in his bill.

Where the defendant does not profess to answer from his own knowledge, it did not require two witnesses to overcome a denial in his answer.

Saturday,  
December 3.

### ERROR to the *Allen* Circuit Court.

HANNA, J.—This was a suit in chancery under the old practice, originally brought by *McIntosh* against *Barbara Townsend*, to set aside a deed for a tract of land, made by one *Wolcott* to said *Barbara*, after the death of her husband, *Joseph*, on the ground that the land had been purchased by said *Joseph*, and paid for by him in his lifetime, and so conveyed after his decease, in fraud of the rights of his creditors, among whom was said complainant.

During the progress of the cause, said *Barbara* died, and her heirs were made defendants. They came in and answered, denying that the property was paid for by said *Joseph* out of his own money, and denying all fraud, but admitting that the property was, as charged in the bill, entered by one *Wolcott*, under some arrangements by which said *Townsend* took possession of, occupied, and improved said land from 1828 until 1843, when *Joseph* died, and averring that the money which paid for the same was that of *Barbara*, their mother, derived from certain legacies received within the time aforesaid; and that it was understood between said *Joseph* and said *Barbara* that the said money should be appropriated to the payment for said land, and the deed taken in her name.

Before her death, the said *Barbara* answered the bill substantially as follows: That *Wolcott*, about the time named, purchased said land, but from whom she did not know. She denied any knowledge of any agreement at the time of the purchase, or afterwards, by which the same was so purchased “solely for the accommodation of said *Joseph*, or was to be sold to said *Joseph*.” She admitted

that said *Joseph* took possession of said land about the time charged, but by whose approbation she did not know, nor did she know of his having purchased said land of said *Wolcott*, or paid him anything therefor, nor that he held the same in trust for said *Joseph*. She admitted that said *Joseph* made improvements on said lands, but says they were of less value than charged; and that certain of said improvements had been made since his death. She admitted that *Wolcott*, after the death of her husband, made a deed to her for said land in consideration of the payment to said *Wolcott* by her of the sum of 200 dollars. She denied that said deed was executed because of the payment of the consideration-money by said *Joseph* in his lifetime, and denied all fraud, &c.

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It is insisted that there is a substantial variance between the facts set up in the answer of said *Barbara*, and the matters relied on in the answers of her heirs, and that said heirs are estopped, by her answer, from setting up any contradictory statement of facts, in defense to the merits of the original controversy, to that she saw proper to rest upon. This presents the first point.

There were no exceptions to the answers of the heirs; nor was any other mode resorted to to test the sufficiency of those answers. A replication was filed taking issue upon them. We think it is now too late to attempt, for the first time, to raise that question.

The cause was submitted, as the record states, upon "bill, answer, replication, and depositions." There was no decree of revivor; but there was a finding and decree that the defendants should pay the debt of plaintiff, and of several other creditors, who came in under the bill within thirty days, or, in default, that said land be sold under execution as on judgments at law.

The case was heard before the new code of procedure was in force; and we must, therefore, examine the evidence, which is in the record, to determine whether the finding and decree is correct.

It is not shown how much personal property was left by the decedent. The bill charges that only about 60 dollars'

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worth was left, and that was taken by the widow under the appraisement. The answers of the heirs admit that was all that came to the hands of the administrator, but aver that more was left by the decedent, upon a portion of which executions were levied, &c. The said *Barbara's* answer admits the allegations in the bill, in regard to the amount of personal property, to be true.

We understand the rule of evidence in chancery proceedings to be, that the answer of one through whom others claim, must be taken, as against them, as *prima facie* true. *Earl of Sussex v. Temple*, 1 Ld. Raym. 310.—*Countess of Dartmouth v. Roberts*, 16 East, 334.—1 Greenl. Ev., § 178, and authorities there cited.

Under the form of submission, in the case at bar, we think the plaintiff had, as against these heirs, to be considered as evidence, the answer of *Barbara Townsend*, and the depositions, so far as the facts stated were relevant to the issues made.

The complainant introduced the deposition of *Wolcott*, who testified that in 1826 or 1827, he entered an eighty-acre tract of land, description not recollected, in *Allen* county, afterwards occupied by *Townsend*, at whose request he made the entry, and for which he was to pay witness 150 dollars, and witness was to make him a deed.

Over the objection of defendants, this witness was permitted to testify that according to his opinion and recollection, he did make and send a deed to said *Townsend* for said land.

Witness also stated that, after the death of *Townsend*, he made a quitclaim deed for said land to the widow of said *Townsend*; and he also stated that the year before *Townsend* died, he spoke to the witness about wishing him to make the deed to his wife, because the purchase-money had belonged to his wife, and on that account he wished the deed to be made, &c.

The witness did not state directly that he had ever received pay for the land, but did say that he had no recollection of ever receiving any money from Mrs. *Townsend*.

The complainant also introduced the deposition of *Ru-*



*fus McDonald*, who testified that at about the time of the death of *Townsend*, or not more than a year or two before, the personal property he had about him might have been worth 500 or 600 dollars.

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He also introduced the deposition of *Elisha B. Harris*, who testified, over the objection of defendants, that he had seen a title deed for the land *Townsend* lived on, as he understood it, from said *Wolcott*. This was some four or six months before *Townsend* died, and [the deed] was shown to witness by him, and was dated a year or two before that time. Witness does not know what became of it.

This evidence, and that of *Wolcott*, in reference to his having made and sent a deed to *Townsend*, if offered for the purpose of contradicting an averment in the bill, was not proper. It did not tend to establish any issue made in regard to the execution of a deed; and to the reverse, it tended directly to contradict a positive charge in the bill, which was, that no deed had ever been made by *Wolcott* to *Joseph Townsend* before his death. The answers did not make an issue upon that averment.

It is stated in 2 Daniel's Ch. Pr., side p. 974, in reference to such charges, that "whether they be true or not, the plaintiff, by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth."

Putting out of view the evidence that a deed was made to *Townsend* during his lifetime, the question is whether the evidence is such as, under our repeated decisions, sustains the decree, upon the issues made by the answers of the heirs, &c.

The allegations in the bill that *Townsend* paid for the land are not directly denied, nor are they admitted, by the answers; but it is averred that whether he made said payment or not, it was, whenever made, so made with the separate money of *Barbara*, &c. The defendants do not profess to answer from their own knowledge, and were not, therefore, in such a position that a denial, in their answers, would require two witnesses, &c., to overcome the same.

*The State v. Holloway*, 8 Blackf. 48.

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We think, in this view of the case, that the plaintiff made out a *prima facie* right to recover. The allegations in the answer, not in response to the averments in the bill, required proof upon the part of the defendants. None such was offered. We are, therefore, of opinion that the decree below should be affirmed.

*Per Curiam*.—The decree is affirmed with costs.

*D. H. Colerick*, for the plaintiffs.

*L. M. Ninde* and *H. W. Puckett*, for the defendants.

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MILLER and Others v. BLACKBURN.

Under the statute of frauds of 1831, a declared trust in respect to lands, could not be set up by parol against an absolute deed importing a valuable consideration on its face; for such trust was inoperative, unless expressed in writing.

*Aliter*, with implied or resulting trusts.

Where a legacy in the hands of the guardian of a married woman was used by him to purchase land, and the deed was made to her husband, with the parol understanding and agreement that the land was purchased for the wife, it was *held*, HANNA, J., dissenting, that the purchase-money was not the separate property of the wife, and that there was, consequently, no resulting trust in her favor.

*Resor v. Resor*, 9 Ind. R. 347, distinguished from this case.

The investment of the wife's legacy in real estate, taking the deed in the husband's name, and his subsequent disposition of the same estate by will, operated as a reduction to the husband's possession of money to which he was entitled in right of his right of his wife. HANNA, J., dissented.

Wednesday,  
December 7.

APPEAL from the *Montgomery* Circuit Court.

DAVISON, J.—The appellee was the plaintiff below, and the appellants, who are the heirs at law of one *Robert Miller*, were the defendants.

The complaint, the object of which is to quiet the title to a tract of land in *Montgomery* county, alleges that on the 17th of *May*, 1855, *Isaac Castor* and his wife, *Amy Castor*, formerly *Amy Miller*, by deed in fee, conveyed all the title of *Amy Castor*, and of her husband, *Isaac Castor*,

in and to the lands described, &c., to the plaintiff; and that *Robert Miller*, the former husband of the said *Amy*, while her husband, purchased, with her separate property, the land in question, but took a deed therefor in his own name, and held it in trust for her. It is averred that prior to his, *Miller's*, death, which occurred in *October*, 1838, he executed a will, whereby he devised the land so purchased, to said *Amy*, his then wife, during her natural life, which will was, after his death, viz., on the 20th of *November*, 1838, admitted to probate; and that *Amy* afterwards intermarried with *Isaac Castor*, who, with his wife, took possession of the land, and conveyed it in fee simple to the plaintiff. It is further alleged, that *Robert Miller* died without issue, and that the defendants are his heirs, &c. The relief prayed is, that the title of the plaintiff derived from *Castor* and wife be quieted, &c.

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Defendants answered—

1. By a general denial.
2. That the land in contest was not purchased with the separate property of *Amy Miller*.
3. That said land was not held in trust for her, &c., but was held by *Robert Miller* in fee simple; that he was so seized at his death; and that the same descended to the defendants as his heirs at law, &c.

There was a reply in denial of the answer, &c.

The issues were submitted to the Court, who found generally for the plaintiff, and specially as to the facts upon which its general finding was based. The defendants moved for a new trial; but their motion was overruled. Judgment for the plaintiff was accordingly rendered.

The facts, so far as they relate to questions presented for our consideration, are these: On the 10th of *April*, 1835, one *William Blackburn*, the father of *Amy Miller*, then the wife of *Robert Miller*, purchased the land in dispute of one *Peter Binford*, and paid for it with money then in his, *Blackburn's*, hands as her guardian. The money thus used had been bequeathed to her by her grandfather. At the time of the purchase, *Miller* was present, when

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*Blackburn* distinctly stated that he was purchasing the land for *Amy Miller*, and with her money. *Binford*, the vendor, at the instance of *Blackburn*, executed the deed to *Robert Miller*, who with his wife, *Amy Miller*, took possession of the land, and continued in such possession until his death.

As stated in the complaint, *Robert Miller* devised the land to *Amy Miller* during her life. He died without issue, and the defendants are his heirs, &c. After this, *Amy Miller* intermarried with *Isaac Castor*, who, with his wife, conveyed the land in fee simple to the plaintiff. The Court, in its special finding, say that at the time the land was purchased and paid for, it was understood and agreed between *William Blackburn*, *Robert Miller*, and *Amy Miller*, that the same was for her use and benefit; that *Robert Miller* entered into possession in pursuance of said understanding and agreement, and held said land in trust for his wife, *Amy Miller*; and that the trust thus declared was by parol and not in writing, but it was made during the negotiation for the purchase, and constituted the terms upon which the money was invested.

There is a bill of exceptions, whereby it appears that when, during the trial, the plaintiff offered to prove by parol the understanding and agreement of *Miller* that the land was held by him in trust for his wife, the defendants objected, but their objection was overruled, and the parol evidence was admitted.

The statutory rule is, that "all declarations or creations of trust or confidence in any lands," &c., "shall be manifested and proved by some writing signed by the party who, by law, may be enabled to declare such trust or confidence," &c., "or else the same shall be utterly void and of none effect; *provided*, that when any conveyance shall be made of any lands," &c., "by which a trust or confidence may arise or result by implication or construction of law," &c., "such trust," &c., "shall be of like force and effect as the same would have been if this act had never been passed." R. S. 1831, pp. 269, 270. Thus, it will be seen that, in this case, there is no declared trust, because

the deed to *Robert Miller* is in terms, absolute, and upon its face imports a valuable consideration; hence, it was not competent for the plaintiff to set up by parol a declared trust, because such trust is inoperative unless it be in writing. But the statute to which we have referred settles the rule that a resulting or an implied trust need not be in writing. It may be proved by parol, even against the face of the deed or the answer of the trustee. And the inquiry at once arises—Is the present a case of resulting trust?

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It has been decided that a trust results by operation of law, "when the estate is purchased in the name of one person, and the consideration comes from another; for instance, if *A.* furnishes money to *B.*, with a view to the purchase of an estate, and *B.* makes the purchase with the money so furnished, and takes the deed in his own name, a trust results to *A.*, because he furnished the money." *Lloyd v. Spillet*, 2 Atk. 150.—4 Kent's Comm. 306.—*Botsford v. Burr*, 2 Johns. Ch. 406.—*Irwin v. Ivers*, 7 Ind. R. 308.

Unless, then, the money invested in the land, at the time it was so invested, belonged to *Amy Miller*, as her separate property, it cannot be assumed that she furnished the consideration upon which the purchase was made. True, the money invested being a chose in action, could not become the absolute property of her husband until he reduced it to possession. Still the wife could, in point of law, have no control over it, and consequently no right to make any agreement respecting it. Her mere right to the money, in case she survived her husband, he having failed to reduce it to possession, would not authorize the conclusion that it was her separate property. Indeed, in a recent well considered case, it has been expressly decided that the interest of the husband in a legacy bequeathed to his wife, before he reduced it to possession, was fixed, certain, and vested, and it was not her separate property. *Westervelt v. Gregg*, 2 Kern. 202, and cases there cited.

We are referred to *Resor v. Resor*, 9 Ind. R. 347. There, the wife having an estate in land, at the instance of her

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husband sold it, and placed the proceeds of the sale in his hands for the purchase of a certain forty-acre tract of land, on the express condition that that tract when purchased should be conveyed to her and her son, it being her intention to reserve the fund for the benefit of her son. With the money so placed in his hands, he bought the land and took the title in his own name, which he held until his death. In view of these facts, it was held that the agreement between the husband and wife was valid in equity, and that there was a resulting trust created in the land in her favor.

The case thus cited is not, in our opinion, applicable to the one before us. The land sold belonged to the wife in her own right, and the agreement between her and her husband being valid, the proceeds of the sale were, of course, her separate property; while, in the case at bar, the money advanced in payment for the land purchased by the husband was not the separate property of the wife, and it seems to follow that there was no resulting trust. The parties may have intended by their agreement that the land conveyed to *Miller* should be by him held in trust for his wife; but that agreement not being in writing, was void by the statute of frauds, and the case stands as it would have stood had no such agreement been made. The result is, that the vesting of the money in real estate, the taking of the deed in his own name, and his subsequent disposition of the same estate by will, must be held to have operated as a reduction to the husband's possession, of money to which he was entitled in right of his wife.

PERKINS, J.—In this case, I am constrained to concur in the opinion of Judge DAVISON. By the common law, marriage vests in the husband the personal property of the wife, and vests in him the absolute right to reduce her choses in action to his possession and use. He needs not her consent, and may disregard her opposition to such reduction, where it can be effected without the aid of a Court of chancery.

By the common law, marriage does not vest in the husband either the title, or the right to acquire it, of her real estate. If he obtains this description of her property, it must be by her free gift, or by a contract with her. If he is driven to obtain it by contract, then he will be bound by the stipulations of the contract, because they will be supported by a valid consideration; and, hence, will be enforced by the Courts. If it is a stipulation of the contract that he shall hold the real estate, or the proceeds of its sale, as a trustee for the wife; or shall invest them again for her use and benefit, execution of the stipulation will be compelled. Such were the cases of *Barnett v. Goings*, 8 Blackf. 284, and *Resor v. Resor*, 9 Ind. R. 347. The stipulations relate to her property, not his.

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But where the wife has money or choses in action, absolutely hers, at the time of the marriage, and which the husband can reduce to possession without the aid of chancery, a promise of his, upon so reducing them to possession, to hold them in trust for the wife, is without consideration, and cannot be enforced. Such promises do not make it her property in his hands, and therefore no trust arises. They do not prevent it becoming his property.

*Totten v. McManus*, 5 Ind. R. 407, is not in conflict with this position. There the husband did not reduce the property of the wife to possession. He permitted her to retain, and vest it in real estate, in her own name. When that was done, it was placed beyond his reach, without the aid of a Court of chancery. It remained the wife's property, unreduced. So, in this case, had the real estate been conveyed to the wife, the husband, by his own consent, would have conferred his rights of reducing upon his wife, or, rather, waived it as to himself, by an executed contract, which he could not have asked a Court of equity to set aside. It would have been trifling with it to do so. On the other hand, as the husband, in this case, had a legal right to the conveyance to his own use, and so took it, his promise to hold it for the benefit of the wife, was without consideration; and such a contract, it is well settled, a Court of equity will not enforce. *Froman v. Froman*, 13

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Ind. 317. Such a contract did not have the effect to continue the consideration—the choses in action, the property of the wife.

And as to *Totten v. McManus*, *supra*, the case does not show that it was not real estate that the wife changed into cash and reinvested.

The case of *Taggard v. Talcot*, cited in *Totten v. McManus*, is without point in the case at bar. In that case, it was not the property of the wife which the husband received, but the property of her father; and it was competent for him to give it to the husband upon such terms and conditions as he pleased. [2 Edw. Ch. 628.]

And it may here be remarked that, by ways of jointure and marriage settlement, property might be vested for the exclusive use of the wife, and be placed beyond the control of her husband, during marriage. Walk. Am. Law, 3d ed., 236. Such property the husband could not, against the consent of his wife, take possession of. And if he did, and used it, doubtless he might be held as a trustee of it, and his estate charged with it after his death.

So where property was given to her during coverture, coupled with the condition that it should be for her separate use, and under her sole control. See 2 Kent's Comm., 6th ed., p. 163. In all such cases, the husband, as such, has no right to take possession of the property.

And our statute seems now to have placed all the separate property of the wife on the same footing with that specially given or conveyed to her use at common law, except that she cannot dispose of it, under the statute, while she could when placed at her separate disposal at common law. See *Hetrick v. Hetrick*, 13 Ind. R. 44, and cases cited. It is true, that a husband may refuse to reduce to possession the property of his wife, and thus leave it hers. *Gochenaur's Estate*, 3 Am. Law Reg., p. 486. But suppose he should so refuse on one day, if the refusal was not upon a consideration, he might exert his right of reduction on a subsequent day. Did he not do that in this case? See 1 Shars. Blacks. Comm., p. 442, notes.

In the case now before us, then, there being no contract



upon a consideration, on the part of the husband, in taking the deed for the real estate in his own name, and it being purchased with funds to which he had a legal right, and no trust being declared in writing, the property became the husband's absolutely.

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In *Ramsdell v. Craighill*, 9 Ohio (Ham.) R. 198, it is held that if husband and wife sell her land, without any special agreement, and he receives the consideration and invests it in land in his own name, no trust arises for the wife. And a subsequent unexecuted promise to pay it to her, amounts to nothing.

HANNA, J.—I cannot concur in the conclusion arrived at by the majority of the Court in this case, and desire, as briefly as I can, to give my reasons.

The Circuit Court found "that the money invested in the land in controversy was invested and paid by *William Blackburn*, late guardian of *Amy Castor*, late *Amy Miller*, and was held by him for her use, and received by him, as her guardian, in part from the estate of her maternal grandfather, being a bequest to her," &c., "as one of the daughters of *Amy Blackburn*; and in part from the estate," &c., "of her uncle."

By reference to the evidence, it will be seen that the bequest to *Amy Blackburn* was made in 1817; that she was married to *Robert Miller* in 1831 or 1832; and that the money was so invested in 1835; upon which, together with other evidence, the Court based the second paragraph of the finding, namely, that "at the time said *William Blackburn* purchased said lands, and paid and invested said funds in the same, the said investment was made with the agreement and understanding between the said *Robert Miller* and *William Blackburn* and *Amy Miller*, that the same was for her use and benefit; and that said deed to *Robert Miller* for the same was directed by the said *William Blackburn* to be executed by *Peter Binford*, the grantor, in pursuance of said agreement; and that the said *Robert Miller* entered into possession of said lands in pur-

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suance of said agreement and understanding, and held the same in trust for the said *Amy Miller*, his wife;" and,

"*Third.* That the declared trust was by parol, and not in writing; but that it was made at the time and pending the negotiation for the purchase and investment, and constituted the terms upon which said investment was made."

I take it to be an undeniable proposition that, so far as any question in the case at bar may be involved, the possession of the guardian of *Amy Miller*, of the said fund, was so far the possession of the said *Amy*, to her separate use, as to constitute the fund her separate property, and give her the right of possession, in fact, when she arrived at a proper age, if she was then unmarried. *Barron v. Barron*, 24 Verm. R. 390.—*Pinney v. Fellows*, 15 *id.* 525.—*Porter v. The Bank of Rutland*, 19 *id.* 410. If this is true, it may be conceded (although there are authorities the other way) that it follows that, at law, her husband would have had the right, after marriage, to have made this fund his own, by reducing it to possession, whatever his rights might have been in equity. As to this, see 2 Kent's Comm. p. 117. But the fund not being in her possession, in fact, the marriage, of itself, would not divest her of that separate estate, and vest it in him. This is manifest from the fact that, if he died before he reduced it to possession, it would not go to his representative, but remain her property. 5 Johns. Ch. 196.—33 Maine R. 43.—15 N. Hamp. R. 568.—8 Mass. R. 99.—17 *id.* 57.—14 B. Mon. 379.

It is also true, that if he had resorted to a Court of equity, to enable him to reduce the property to possession, the Court might, and most probably would, have compelled him to make a suitable provision for her. 14 S. & M. 59.—Story's Eq., § 1403.—Hill on Trustees, p. 408, and note.

She possessed, then, at the time of the marriage, the right to this separate personal property in the hands of her guardian. No trust as to that property was then interposed; and if any exists, it rests upon a post-nuptial agreement. As to the power of the wife to dispose of her

separate property by such agreement, Judge STORY says: "There is a material distinction whether it be personal or whether it be real estate. In the former case, her power to dispose of it can affect her husband's rights only; and, therefore, his assent is conclusive upon him." 2 Story's Eq., § 1391, and note. That after marriage, agreements may be made, in regard to the wife's separate property, binding in equity upon the husband, is fully established by our own Court. *Resor v. Resor*, 9 Ind. R. 347.—*Id.* 100.—5 *id.* 407.—8 Blackf. 284. And is conceded in the language used in the opinion in this case. And, as a general rule, whenever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity, when made with each other without the intervention of trustees. Story's Eq., §§ 1372, 1380.—24 Verm. 398.—2 Kent's Comm., pp. 147, 154.—1 P. W'ms, 125.—2 Verm. R. 659.—2 Johns. Ch. 537.—10 Ves. 146.—9 Paige, 284.

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In the case at bar, whatever might have been the right of *Miller* to sue at law and recover, and in that manner, or otherwise, reduce to possession this separate property of the wife, yet as he did not see proper to exercise that right, but, as the Court find, agreed to a disposition of it in derogation of his marital rights, he in effect waived any right which he might have to the property. I am not able to perceive why the case does not fall within the doctrine laid down in 2 Story's Eq., § 1380, namely—

"That whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her separate or exclusive use, without the intervention of trustees, the intention of the parties may be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband. In all such cases, her husband will be held a mere trustee for her; and though the agreement is made between him and her alone, the trust will attach upon him, and be enforced in the same manner, and under the same circumstances, that it would be, if he were a mere stranger. And it will make no difference, whether the separate es-

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tate be derived from her husband himself, or from a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice."

It is true, the section last quoted speaks of property given, &c., "for her separate use," and, in the case at bar, neither the finding of the Court nor the evidence shows that the bequest was thus limited; but, under the authority of STORY, first above quoted, § 1391, I do not see but that the husband is as completely controlled in an instance where, after marriage, he should agree with her that she might thus dispose of her personal property, namely, "for her separate use," as in an instance where the bequest itself contained such a limitation.

If I am correct in this conclusion, then, by the last section quoted from STORY, it is established that the husband himself may become the trustee, and will be held bound as such. See, also, HILL on Trustees, p. 75, where it is said that "there is no question but that a husband may hold property as a trustee for the separate use of his wife."

In the case at bar, the Court found that the husband held the property as the trustee of the wife. In other words, the Court, by its finding, negatives the idea that the husband had reduced the property of the wife to his possession, as husband.

MR. HILL uses the following language: "What will constitute an actual reduction into possession, is not susceptible of exact definition, but depends on intention. There must be, in the first place, some distinct act, evincing a determination to take, as husband." HILL on Trustees, 415, note 1.

Thus, where a mother and daughter were entitled to certain slaves as co-distributees, but the slaves were never divided, and the husband of the daughter, residing on the mother's plantation, worked the slaves together, it was held that the marital rights of the husband had not attached. *Durant v. Salley*, 3 Strobb. Eq., p. 159.—*Rogers v. Burnpass*, 4 Ired. Eq., p. 385.

So where the husband receives from the executors of an

estate, from which his wife is entitled to a legacy, money, not as an advance, but under a contract to refund, or an understanding that it is to be employed in part payment of land bought in the wife's name. *Savage v. Benham*, 17 Ala. R. 120.—*Barron v. Barron*, 24 Verm. R. 375. In the latter case, it is held that the receipt of the money must be the result, or by virtue of his marital rights.

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The question of reduction to possession thus depending, in a great measure, upon the husband's intention, acts which, *prima facie*, would establish a reduction, may be shown by other circumstances, or by his declarations at the time, or subsequently, to have been intended for the benefit of, or in trust for, his wife. *Hind's Estate*, 5 Whart. 138.—*Gray's Estate*, 1 Barr, 327.—*McDowell v. Potter*, 8 *id.* 191.—*Gochenaour's Estate*, 23 Penn. St. R. 460.—*Mason v. McNeil*, 23 Ala. R. 201.—*Resor v. Resor*, 9 Ind. R. 349.

Keeping these authorities in view, and looking at the finding of the Court below, and the evidence which sustains that finding, I dissent from the conclusion arrived at by this Court, namely, that the several acts of the parties, based upon that agreement and heretofore stated, "operated as a reduction to the husband's possession, of money to which he was entitled in right of his wife." This implied or constructive reduction to possession could not exist, in the case at bar, because the intention, upon the part of the husband, to so act, was, so far as the record speaks, entirely absent, at the time he took the deed to the land, and thereby received, in that form, the fund which had been the separate property of the wife. He received it, as we have seen, under an agreement which, I believe, in equity, constituted him a trustee of the property for her use. He could not afterwards, in my opinion, by his own act, change the relation which he bore to the property and the person for whose use he held it, so far as to then make it his own; for the reason that to permit him to do so would be opening the door to a wide field of fraud upon the rights of persons for whose use property is held, and who would thus, without their consent, be deprived of it

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by those standing in a fiduciary capacity towards them. Having received the property, as a trustee, all his acts, in reference thereto, must conform to, and be presumed to be intended by him to carry out in good faith, that trust; unless that relation should be afterwards changed. The circumstances of the case at bar are such that I am not aware of anything that could have intervened to have changed that relation, unless it might be a subsequent agreement made between him and his wife in reference thereto. How far such an agreement, if made, might have been binding upon her, it is not necessary to inquire, as none such was established.

Having thus shown that the said *Amy Blackburn* had the right, before her marriage to *Robert Miller*, to certain legacies, as her own separate property; that the marriage did not, of itself, vest that property in him; that up to the time the deed to the land in controversy was made to him, he had not reduced her property to possession; that by the agreement then made, the intention of the parties was manifested that it should remain her separate property, though vested in his name, but for her use; the only inquiry now to be made is, whether these several propositions were established by legitimate evidence.

It is insisted by the appellants, that the trust, to have been operative, should have been in writing. In this a majority of the Court concur, and make the whole case turn upon that question.

The appellants rely mainly upon the case of *Irwin v. Ivers*, 7 Ind. R. 308. The facts in that case were that the father and mother of the parties held a certain demand for money, &c., also a tract of land in *Ohio*, both of which they transferred, by proper instruments in writing, absolute on their face, to the defendant, their son, who sold the land and collected the money. His brothers and sisters sued, charging that he held it in trust for all the children, &c. The charge was sustained by parol evidence. The Court held that the parol evidence varied materially both the assignment and the deed, and proved a specific trust, verbally declared, and, therefore, void under the statute.

In that case, the Court also held "that a resulting or implied trust need not be in writing, and [might] be proved by parol, even against the face of the deed or the answer of the trustee, is a principle too plain to admit of controversy." The Court held further, as I construe the opinion, that there was no implied or resulting trust, for two reasons; first, that where a trust was declared, there could be no room for implication; and, second, that no money had been advanced by the *cestui que trust*.<sup>9</sup>

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From the facts in the case, as stated, proved, and found by the Court, it will be at once seen that the second reason given by the Court, in the case cited, has no application in the case at bar. Here the money was all advanced by *Amy Miller*, or her guardian for her, out of her separate property, as I maintain, for I cannot concur in the conclusion of the Court that the legacy, &c., was not her separate property after marriage. It is necessary to inquire how far she had the right to control it against her husband's will, or without his consent; for the facts in the case, and the finding of the Court, show, that whatever control she may have exercised over it, was with his full consent as to the disposition thereof; and in such an instance, the authority of STORY, § 1391, is, that he is concluded by that consent, and of course his heirs also. But there are many authorities fully sustaining the position, that a legacy or distributive share of a wife, in the hands of an executor or guardian of the wife, is, before marriage, and continues after marriage to be, her separate property, until reduced to the actual possession of the husband. 5 Ves. 737.—1 Lead. Cas. in Eq., 333, 352.—19 Verm. R. 410.—2 Kent's Comm., p. 146.—1 Ves. 186.—9 N. Hamp. R. 309.—12 *id.* 164.—6 Met. 537.—6 Johns. Ch. 178.—5 *id.* 198.—10 Verm. R. 446.—24 *id.* 396.

A broad distinction, as it appears to me, exists between the case in 7 Ind. and this, in other respects. That was a case in which a specific trust might have been very properly declared by the parties to the original transaction. In this case, the grantor of the land was a stranger to the parties to the mutual arrangement, and had no interest



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whatever in declaring a trust. No writing, other than the deed from such grantor, was necessary to complete the conveyance of the land; so that neither of the parties to that agreement had an opportunity to insert such a clause in any writing then executed, or necessary to be executed, unless it should be held that a separate writing to that effect should have been executed. Such a writing, as to an innocent purchaser for a valuable consideration, it appears to me, would form no part of the deed, and could have no more force, nor be any further a notice, than the verbal agreement. It is not a case, therefore, peculiarly or positively requiring a declaration in writing, of the trust intended to be created. It is not necessary to inquire whether the first reason given by the Court in the case cited, is the law to the full extent there indicated, to-wit; that where a trust is declared there is no room for implication. See, on this point, Hill on Trustees, 116, and note. But it is clear to my mind that the facts in the case cited in 7 Ind. were so different from those in the case at bar, that it is not authority in point to sustain the position assumed by the appellant.

If this is a case in which the trust was not imperatively required to be in writing, the next question is, whether there could arise a resulting trust. That the purchase of land, and payment of the consideration-money by one person, where the deed is taken in the name of another, will raise a trust in favor of the purchaser, is a doctrine too well settled to need more than a reference to it. 2 Story's Eq., § 1201. And, going a step further, it might be safely said that there are now so many authorities and adjudicated cases, establishing the doctrine that a trust results to the wife, where the husband buys land with her separate property or the savings of her separate estate, that it can scarcely be classed among questions open to controversy. See 1 Johns. Ch. 450; 3 *id.* 77; 1 Johns. (Md.) Ch. 523; 1 Sandf. Ch. 214; 15 Verm. R. 525; 24 *id.* 375; 23 L. J. Ch. 890; 14 Ill. R. 505; 10 Hare, 209; and also the cases in our own Court heretofore cited.

That an implied or resulting trust may be established



by parol evidence, has been so often decided by this Court, that it is too late now to insist upon the adoption of any other rule of evidence in relation to that point. Indeed, the change of the rule, in that respect, at this day, would overrule many adjudicated cases, beginning as far back as *Elliott v. Armstrong*, 2 Blackf. 198, and continuing down through *Jenison v. Graves*, *id.* 440; *Blair v. Bass*, 4 *id.* 539; *Baker v. Leathers*, 3 Ind. R. 558; *Fausler v. Jones*, 7 *id.* 277; *Barnett v. Going*, 8 Blackf. 285; *Totten v. McManus*, 5 Ind. R. 408; *Resor v. Resor*, 9 *id.* 347; and many other cases that might be referred to.

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If this current of decisions is sustained, it follows that of a mere resulting trust parol evidence was properly received. That this was a resulting trust I entertain no doubt.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*R. C. Gregory, A. Thompson, and J. Ristine*, for the appellants.

*J. E. McDonald and S. C. Willson*, for the appellee.

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MILLER and Others v. BLACKBURN.

ON PETITION for a Rehearing.

Tuesday,  
May 15, 1860.

WORDEN, J.—Each of the other members of the Court having delivered opinions in this cause when it was decided, it may not be improper for me now to state briefly why, in my opinion, the judgment below should be reversed, and consequently why the petition for a rehearing should be overruled.

The general facts of the case need not be here re-stated, but a portion of the complaint may be adverted to, as well as the findings of the Court in relation to the points, presenting the merits of the controversy.

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The complaint alleges that the land "was by one *Robert Miller*, former husband of the said *Amy*, purchased with the separate property of the said *Amy*, on," &c., "and in truth and in fact belonged to her in her own right; but the deed to the same was taken in the name of said *Robert Miller*, her former husband, and was by him held in trust for her." On the trial, the plaintiff obtained leave and amended the complaint by striking out the word "separate," where it occurs in the above allegation.

The Court found—

"*First.* That the money invested in the lands in controversy was invested and paid by *William Blackburn*, late guardian of *Amy Castor*, late *Amy Miller*, and was thereby held by him for her use, and received by him as her guardian, in part from the estate of her maternal grandfather, *William Kenworthy*, being a bequest to her in the last will of the said *William Kenworthy*, as one of the daughters of *Amy Blackburn*, and in part from the estate of *Isaac Kenworthy*, her uncle.

"*Second.* At the time said *William Blackburn* purchased said lands, and paid and invested said funds in the same, the said investment was made with the agreement and understanding, between the said *Robert Miller* and *William Blackburn* and *Amy Miller*, that the same was for her use and benefit, and that said deed to *Robert Miller* for the same was directed by the said *William Blackburn* to be executed by *Peter Binford*, the grantor, in pursuance of said agreement; and that the said *Robert Miller* entered into possession of said lands in pursuance of said agreement and understanding, and held the same in trust for said *Amy Miller*, his wife.

"*Third.* That the declared trust was by parol, and not in writing, but that it was made at the time and pending the negotiations for the purchase and investment, and constituted the terms upon which the investment was made."

The statute of frauds applicable to the case (R. S. 1831, p. 269), provides that "all declarations of trust or confidence, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the

party who, by law, may be enabled to declare such trust or confidence, or by his last will in writing, or else the same shall be utterly void and of none effect." Trusts arising by implication or construction of law are excepted.

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This statute does not, as I think, require the trust to be *created* in writing. It is sufficient if it be *manifested* or *proved* by writing, signed by the party enabled to declare the trust. This is believed to be the settled construction of the *English* statute, of which ours is a transcript. Hill on Trustees, 56.—Browne on Stat. of Frauds, 94, *et seq.*

Now, the finding of the Court upon this point, is, that "the declared trust was by parol, and not in writing," that is to say, it was not declared in writing. This does not necessarily imply that the trust may not have been *proven* or *manifested* in the manner prescribed by the statute. But an examination of the evidence, all of which is set out, shows that the trust was not proven by any writing signed as provided for; hence, it appears that the statute was not complied with.

That the trust set up, viewed as an express trust, is within the statute, and void unless manifested or proven as therein provided, I have no doubt. It is unnecessary here to discuss the question as to what person is enabled by law to declare the trust. In Browne on Stat. of Frauds, § 106, it is laid down that "the requisition in the statute that the writing shall be 'signed by the party who is by law enabled to declare such trusts, or by his last will in writing,' will be met by the signature by the grantor himself, if the declaration be previous to, or contemporaneous with, the act of disposition. If subsequent to it, the person legally entitled to declare the trust will be the trustee himself."

Had *Binford*, the grantor, by the consent and agreement of the parties, in making the deed to *Miller*, expressed therein that the conveyance was for the use of and in trust for said *Amy*, I see no reason why that would not have been a sufficient declaration of the trust, although it might have been a matter of entire indifference to him how the conveyance was made. Again, had *Miller*, after the con-

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veyance to him, declared the trust, and manifested that declaration in the mode prescribed, I do not perceive why that would not have been sufficient. But however this may be, there must always be some person enabled to declare every express trust; and it is not material here to determine who was the proper person, as none was proven, in the mode prescribed, to have been declared by any person.

The express trust set up being void, it remains to inquire whether there was any resulting trust that can be made available.

At the threshold of this examination, we are met with a proposition laid down by *Sugden* (Sug. on Vend. and Pur., p. 417), as follows: "An express trust, although by parol only, will prevent the resulting trust; because resulting trusts are left by the statute of frauds and perjuries as they were before; and previously to the act, a bare declaration by parol would prevent any resulting trust." *Vide*, also, 1 Greenl. Cruise, tit. 12, ch. 1, § 46; 1 L. C. E., 195. This doctrine, "as a general rule," has been approved by this Court. *Irwin v. Ivers*, 7 Ind. R. 310. The Court say: "The appellee assumes in argument that there is a broad distinction between declared and implied trusts. The law implies a trust in the absence of one declared. Where a trust is declared, there is no room for implication, and a declared trust must be in writing. As a general rule, we concur in this doctrine," &c.

If the proposition laid down by *Sugden* is to be taken as law, in the broad and unqualified extent which would seem to be indicated by the language employed by him, it is decisive of this case, as here there was an express trust proven by parol, and any implied trust being prevented thereby, it follows that there is no trust in the case that can be enforced.

But I do not choose to stop the inquiry here, as it seems to me that, whatever may be the law in a case where the express trust is materially different from the one to be implied by law from the facts, the rule laid down may not be applicable to a case where the express trust proven by

parol is the same as the one resulting by implication, there being no antagonism between them. To illustrate: If *A.* buy an estate with his own money, and take a deed in the name of *B.*, with a parol agreement between them that *B.* is to hold the property in trust for *A.*, I am not satisfied that the trust thus declared, would prevent the trust resulting to *A.* from the fact that the estate was purchased with his money.

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As a general proposition, it may be stated that where lands are bought with the money of one person, and a deed taken in the name of another, a trust results in favor of the party whose money is thus invested. Numerous authorities upon this point are collected in note to page 92 of Hill on Trustees, and notes to *Dyer v. Dyer*, 1 L. C. E. 138.

In this case, if there is any resulting trust in favor of *Amy Miller*, it is because it was her money that was invested in the purchase.

This leads to an examination of the only question in the case that presents any difficulty, viz., whose money was it that was thus invested? This question must be tested by the law in force at the time of the transaction, which was before the recent statutes enlarging the rights of married women. The money in the hands of the guardian of *Amy Miller* can, in no sense, as I conceive, be deemed to have been her separate property. There is nothing in the finding of the Court, nor in the evidence, to show that it was, in any manner, limited to her separate use. In 2 Story's Eq., § 1381, it is said that "there is no doubt that when, from the terms of the gift, settlement, or bequest, the property is expressly, or by just implication, designed to be for her separate and exclusive use (for technical words are not necessary), the intention will be fully acted upon, and the rights and interests of the wife sedulously protected in equity. But the question that most frequently arises, is, what words are sufficiently expressive of that purpose; for the purpose must clearly appear beyond any reasonable doubt; otherwise, the husband will retain his ordinary, legal, and marital rights over it."

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Undoubtedly, property may be bequeathed, or otherwise conveyed, to a woman, either sole or married, for her sole and separate use, so as to prevent her husband, future or present, from claiming it by virtue of the marriage. But, as before observed, there is nothing in the present case to show that the bequest to *Amy*, or the share that she received from the estate of her uncle, was to be for her separate use. Indeed, the plaintiff, on the trial, abandoned the claim that the money was her separate property, by striking the allegation out of the complaint.

The money invested in the land, not being the separate property of the wife, became, in my opinion, the property of the husband by virtue of the marriage. It was not a mere chose in action, which, in order to make it the property of the husband, required a reduction to his actual possession. Money in the hands of a guardian is deemed in law to be in the possession of the ward, and that possession of the ward became the possession of her husband upon her marriage. This view is fully sustained by the following authorities: *Magee v. Toland*, 8 Port. (Ala.) 36; *McDaniel v. Whitman*, 16 Ala. R. 343.—*Chambers v. Perry*, 17 *id.* 726.

The case of *Magee v. Toland*, involved the right of *Toland*, the plaintiff, to a slave. The facts were that the guardian of *Jane Carnathan* was in possession of a slave belonging to *Jane*, his ward. On the 1st of *January*, 1835, the guardian hired the slave to the defendant, *Magee*, for a year. In *June* of the same year, *Jane* intermarried with *Toland*, and in *August* following she died without issue, leaving brothers and sisters. The slave was not in the actual possession of either *Toland* or his wife during the coverture. The Court say: "It appears that the slave was owned by the wife previous to, and at the time of, the marriage, and was in the possession of the defendant, as a bailee, for hire, holding under the guardian of the wife. The authority already referred to expressly states that the possession of the bailee is also that of the bailor, and it only remains to show that the possession of the guardian is also the possession of the ward. Independent

of the manifest reason that such a rule should obtain, we find no direct decision on the precise point, in relation to personal property, but the authorities are numerous and concurrent that the possession of lands by the guardian in socage, is the possession of his ward, and that no entry is required to be made by him. \* \* \* No reason is conceived by the Court why the possession of the guardian should not be held as the possession of the ward, in relation to all personal chattels capable of possession, as it is clearly a title derived under the ward, and held solely and exclusively for his benefit. The guardian has an interest in the thing possessed, without which he would not be able to sustain an action; but such interest is consistent with, and ancillary to, the property of the ward; it never has been supposed otherwise. As the possession of the defendant below was the possession of the wife at the time when the marriage was contracted, it results that the property in the slave in question was transferred to the husband at the instant of marriage, and was then as much in his possession, in point of law, as it could afterwards have been by actual manucaption."

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The case of *McDaniel v. Whitman* was this. A ward, having money in the hands of her guardian, married *McDaniel*, and died without anything being done to reduce the money in the guardian's hands to the actual possession of the husband. The Court say: "The only question raised by the record is—Is the husband entitled to moneys in the hands of the guardian of the wife, after her death, which he had never recovered or had in his actual possession during the existence of the coverture? According to repeated decisions of this Court, the husband is not entitled to his wife's choses in action, unless he reduce them to possession during coverture. \* \* \* It was, however, decided by this Court, some ten years since, that the possession of personal property by the wife's guardian, must be considered the possession of the wife, and as upon the marriage of the ward, her legal existence becomes merged in that of her husband, the possession, by operation of law, is *eo instanti* transferred to

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the husband, and requires no further act on his part to vest his marital rights. *McGee v. Toland, supra.* True, that case involved a controversy in respect to a slave which had gone into the guardian's possession; but I can see no difference, so far as respects the application of the rule, between one description of personal property and another. The constructive possession of the husband, by virtue of which his marital rights attach, arises out of the relation in which the guardian stands towards him, as well in respect to the money which the guardian has received, as to the slave. As to both, the possession of the guardian must be regarded as the husband's possession, and upon the final settlement of the account, the husband, who has survived his wife, must be considered as the person entitled."

The same doctrine is maintained in *Chambers v. Perry.*

"The guardian is held in this country to have only a naked authority, not coupled with an interest. His possession of the property of his ward is not such as gives him a personal interest, being only for the purpose of agency." 1 Pars. Cont., p. 114.

Undoubtedly, a legacy, or distributive share in an estate, so long as it remains unpaid by the executor to the legatee or distributee, or to some one entitled to receive it on his behalf, is a mere chose in action. But when it is received by the guardian of the legatee or distributee, it loses its character of a thing in action, for it is reduced to the possession of the ward through the person appointed by law to receive it on his behalf.

Being satisfied, as I am, that the money of *Amy*, in the hands of her guardian, became vested in her husband by virtue of the marriage, and would have gone to him had he survived her, not merely as her representative, but in virtue of his marital rights, or in case of his death leaving her surviving, would have gone to his administrator, although not reduced to his actual possession during coverture, I deem it unnecessary to inquire whether, had it been a mere chose in action, the taking possession thereof by the husband, as her trustee, and not in virtue of his mari-



tal rights, would have been such a reduction to possession as would have made the money the husband's, and deprived the wife of the benefit of the implied trust that might have arisen if the money invested were to be deemed hers.

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HEUSTIS.

For these reasons, I am of opinion that there can be no implied trust in favor of *Amy*, arising out of any supposed investment of her money in the land, as the money invested was, in law, her husband's, and not hers; and the express trust set up being void by the statute of frauds, it follows that the decision heretofore pronounced was correct; hence, I think the petition for a rehearing should be overruled.

*Per Curiam.*—The petition is overruled.

Counsel the same as on the former hearing.

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VAIL v. HEUSTIS.\*

APPEAL from the *Dearborn* Court of Common Pleas. *Monday, December 12.*

*Per Curiam.*—The judgment in this case is affirmed for the reasons given in *Vail v. Heustis*, at the present term (1), the facts and questions arising in the record of each case being similar.

The judgment is affirmed with 5 per cent. damages and costs.

*J. Schwartz* and *P. L. Spooner*, for the appellant.

*D. S. Major*, for the appellee.

(1) There is no such case. — *Sic Infra* p. 67

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\* A petition for a rehearing of this case was filed on the 21st of *January*, and overruled on the 8th of *May*, 1860.

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1859.

TIBBETTS v. THATCHER.\*

TIBBETTS  
v.  
THATCHER.

A written promise to pay a sum of money was assignable by indorsement under the statute of 1838, and, therefore, where no consideration for the promise was expressed, it was *held* that a valid consideration must be presumed.

Thursday,  
December 15.

APPEAL from the *Dearborn* Court of Common Pleas.

DAVISON, J.—The appellee was the plaintiff below, and the appellant the defendant.

The complaint charges that *John Tibbetts*, on the 21st of *March*, 1837, made his promissory note, whereby he promised to pay *Isaac Jones*, at twelve months, 37 dollars, 50 cents, and that *Jones*, on the 14th of *September*, in the same year, assigned the note to the plaintiff; that the defendant, on the 27th of *April*, 1838, agreed with the plaintiff, in writing, that he would pay the plaintiff the said note, and would also pay him 10 per cent. interest thereon until it was paid; but in drawing up said agreement, the defendant, by mistake, omitted and left out of the same the promise to pay the note, and only inserted therein the promise to pay 10 per cent. interest thereon. The agreement as drawn up reads thus:

“Mr. *Elijah Thatcher*: I will pay 10 per cent. on that note given to *Isaac Jones* by *John Tibbetts*, for 37 dollars, 50 cents, from the first of *March* last until paid. [Dated] *April 27*, 1838.”

“*Benjamin Tibbetts*.”

The relief prayed is, that the agreement be reformed, and the mistake corrected, and that the plaintiff have judgment, &c.

Defendant demurred to the complaint on two grounds—

1. It does not state facts sufficient to constitute a cause of action.

2. It fails to show any consideration for the promise alleged to have been made by the defendant.

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\*A petition for a rehearing of this case was filed on the 8th of *February*, and overruled on the 8th of *May*, 1860.

The demurrer was overruled, and thereupon the defendant answered by a general denial.

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1859.

The cause was submitted to the Court for trial, and, upon final hearing, it was adjudged that said agreement be reformed, and said mistake stand corrected, so as to read that defendant should "pay said note of 37 dollars, 50 cents, and 10 per cent. interest thereon from the first of *March*, 1853, until paid." And further, it was adjudged that plaintiff recover of the defendant 112 dollars, 50 cents, being the amount of the note, and interest computed at 10 per cent. from the first of *March*, 1838.

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v.  
THATCHER.

The second ground of demurrer, namely, that the complaint fails to show a consideration for the written promise alleged to have been made by the defendant, involves the only question to settle in the case. Outside of the contract in suit, the complaint alleges no consideration, and unless the contract, on its face, imports a consideration, the demurrer is well taken.

As a general rule, all negotiable paper is presumed to have been given upon a sufficient consideration; and this rule obtains whether the paper sued on be negotiable under the law merchant, or assignable under the provisions of a statute. *Arnold v. Brown*, 3 Blackf. 273.—*Nichols v. Woodruff*, 8 *id.* 493.—*Streeter v. Henley*, 1 Ind. R. 401.—*Rogers v. Maxwell*, 4 *id.* 243. It follows that if the contract before us was negotiable, or assignable under a statute, the complaint is sufficient without alleging the consideration upon which it was given.

The statutes in force when this contract was made, declared that "All notes, bills, bonds, or other instruments of writing, that shall hereafter be made by any person," &c., "whereby such person," &c., "shall promise to pay any sum of money, or acknowledge any sum of money to be due," &c., "or for the delivery of any specific article," &c., "shall be, and the same are hereby made, assignable by indorsement thereon," &c. R. S. 1838, p. 118, § 4.

Here, the contract involved a promise to pay a sum of money, and was, therefore, assignable under the above-recited provision of the statute, and, in view of the deci-

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v.  
McCRAV.

sions to which we have referred, is presumed to have been given upon a valid and adequate consideration. True, between the original parties to the contract, or between the assignee and the maker of such instrument, its consideration may be made the subject of inquiry; but the burden of proof lies on the defendant to rebut the presumption raised by implication of law.

The demurrer, in our judgment, was not well taken.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*B. J. and P. L. Spooner*, for the appellant.

*D. S. Major*, for the appellee.



### MAY and Others v. McCRAV.\*

Saturday,  
January 14,  
1860.

APPEAL from the *Marion* Circuit Court.

*Per Curiam.*—This was a suit upon notes, and to foreclose a mortgage given to secure the payment thereof. Judgment for the amount of the notes and of foreclosure.

There is no error pointed out by the brief of counsel.

The judgment is affirmed with 2 per cent. damages and costs.

*A. May*, in person.

*J. W. Gordon*, for the appellee.

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\*A petition for a rehearing of this case was filed on the 14th of *March*, and overruled on the 3d of *May*, 1860.

C A S E S  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,  
AT INDIANAPOLIS, MAY TERM, 1860, IN THE FORTY-FOURTH  
YEAR OF THE STATE.

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JONES *v.* THE CINCINNATI TYPE FOUNDRY COMPANY.

14	89
145	423

A contract with a party as a corporation, estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such.

If the style by which a party is contracted with is such as is usual in creating corporations—viz., naming an ideality, but disclosing the name of no individual, as is usual in cases of simple partnership—it would *seem* to indicate, *prima facie*, a corporate existence.

The general denial in the answer, admits the capacity of the plaintiff to sue; and a special answer in a subsequent paragraph, denying his competency, is in the nature of a plea in abatement—a dilatory answer—and is inconsistent with the general denial.

Answers to the jurisdiction, the disability of parties, &c., must precede those to the merits; because each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter.

APPEAL from the *Grant* Circuit Court.

PERKINS, J.—Suit upon a promissory note.

“The *Cincinnati Type Foundry Company*, a corporation,”

*Monday,*  
*May 28.*

May Term,  
1860.

JONES  
v.  
THE CINCINNATI  
TYPE  
FOUNDRY CO.

&c., "complains of *David W. Jones*, defendant," &c., upon a promissory note, of which a copy is set out thus:

"\$279. *Indianapolis, Indiana, October 11, 1857.*

"Six months after date, I promise to pay to the order of the *Cincinnati Type Foundry Company*, two hundred and seventy-nine dollars, for value received, without relief from valuation laws. *David W. Jones.*"

The defendant demurred to the complaint. The demurrer was overruled, and rightly.

The defendant then answered—

1. That he was not indebted to the plaintiffs.
2. That each and every allegation of the complaint was untrue.
3. That the plaintiffs had not a legal capacity to sue, because not a corporation.

Issue. Trial. The note constituted all the evidence. Judgment for the plaintiffs on the note.

The appellant contends that the case was not made out against him, because it was not proved that the appellees were a corporation, and thus possessed of the capacity to sue.

The appellees insist that the note sued on is a contract with them as a corporation, and that their existence is thereby admitted.

As a general proposition, it is the law of this state that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. *Shappel v. Hubbard*, at this term (1).

And it has been held in other states that where individuals are incorporated upon performance of certain acts, a person who contracts with them by their corporate name, cannot, in an action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. *Hamtranck v. The Bank of Edwardsville*, 2 Miss. R. 169.—*Tar River Navigation Co. v. Neal*, 3 Hawks, 520. See 1 U. S. Dig., 593; 4 *id.* 433.

In *New York*, to work such estoppel, it has been necessary that the contract should state that the party con-

tracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state.

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1860.

JONES

v.

THE CINCIN-  
NATI TYPE  
FOUNDRY Co.

If the style by which a party is contracted with is such as is usual in creating corporations, viz., naming an individual, but disclosing that of no individual, as is usual in the cases of simple partnerships, it has been treated as *prima facie*, at least, indicating a corporate existence. And such seems to have been the rule at common law. Grant on Corp., 62. Probably, a special answer, in such cases, in the nature of a plea in abatement, might, at the proper time, be made available. See Ang. and Ames on Corp., 506, 507, and the numerous cases in our own Reports.

And there is no hardship in this. The party executing the note, owes the amount of it. The judgment upon it in the suit merges it, and the payment of the judgment satisfies it, and bars any other action against the maker for the money.

But, in this class of cases, it would seem, after all, that the Courts have proceeded upon a rule of evidence, rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact. *Grant*, in his late learned work on Corporations, says: "Generally, the fact of an aggregate body being called by a name, is, *prima facie*, evidence that they are incorporated, 'for the name argues a corporation.' *Norris v. Staps*, Hobart, 11. But the Courts take judicial notice that 'A. B. and company' is not the name of a corporation. *Rex v. Harrison*, 8 T. R. 508."

The doctrine of conclusive estoppel seems more properly applied to cases involving the question of legality of organization, where the fact of an existing statute, authorizing, in the given case, such corporation, is known to the Court, either by judicial notice or actual evidence in the cause.

In such cases, where a party has contracted with a body as being organized as a corporation under the law, he will

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NATI TYPE  
FOUNDRY CO.

be estopped to dispute the legality of the organization. See the cases cited in the U. S. Dig., and Ang. and Ames, *ubi supra*.

This doctrine of estoppel, as applied to contracts with corporations, needs further examination; but it is not important in this case, and we shall not here pursue it. The decision of this case will rest upon another ground.

It is well settled law in this state, that the general denial, by the defendant, of the cause of action stated in the complaint of the plaintiff, admits the capacity of the plaintiff to sue. *Shappel v. Hubbard*, at this term (2).

In *The Society for the Propagation, &c. v. The Town of Pawlett, &c.*, 4 Pet. 480, Judge STORY, in delivering the opinion of the Court, says: "The general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring."

This is now the law in *New York*, by statute. 3 Kern. 309.

And a special plea or answer, denying the competency of the plaintiff to sue, is in the nature of a plea in abatement—a dilatory answer. 4 Pet. *supra*; *Jones v. The Bank of Tennessee*, 8 B. Mon. 122; *Savage Manufacturing Co. v. Armstrong*, 17 Maine R. 34; and see 6 N. Hamp. R. 197, 527.

But the order of pleading has always been, and is still, under the code, that pleas or answers, to the jurisdiction, to the disability of parties, &c., must precede those to the merits; and this because, as says Mr. CHITTY in his Pleadings, vol. 1, p. 440, "each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter." See, also, Walk. Am. Law, 3d ed., p. 572; *Gatling v. Newell*, 7 Ind. 147; Perk. Pr., 223; Ind. Dig., 1.

Indeed, a subsequent paragraph of an answer denying the competency of the plaintiff to sue, would be palpably inconsistent with a prior one admitting such competency. See *Hamar v. Dimmick*, at this term (3); and 9 How. Pr. R. 289, 67; 10 *id.* 44; and *Mott v. Burnett*, 2 E. D. Smith, 50.



*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs. May Term,  
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*H. S. Kelley*, for the appellant.

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- (1) *Post*.
- (2) *Post*.
- (3) *Post*, 105.

14	93
124	147
124	523
124	557
126	59
14	93
133	38
133	92

14	93
161	239

14	93
168	513
168	516
e168	517
e168	518

14	93
f169	67
169	68
169	71

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The clerk of the Circuit Court is merely a ministerial officer, and in respect to the approval of official bonds, he has no discretion except to determine whether the security offered is sufficient.

The governor may determine, even against the decision of a board of canvassers, whether an applicant is entitled to receive a commission or not, where the objection to his right to receive it rests upon the ground that a constitutional prohibition is interposed.

If the governor should ascertain that he has commissioned a person who is ineligible to the office, he may issue another commission to the person legally entitled thereto.

Where a majority of the ballots at an election were for a person not eligible to the office under the constitution, it was *held* that the ballots cast for such ineligible person were ineffectual, and that the person receiving the greatest number of legal votes, though not a majority of the ballots, was duly elected, and entitled to the office.

The mayor of a city, under the general law, has jurisdiction as a judicial officer throughout the county; and the voters of the county are, therefore, chargeable with notice of his ineligibility, under the constitution, to any office other than a judicial one, during the term for which he was elected.

A writ of mandate is the proper remedy against a clerk for refusing to approve an official bond.

APPEAL from the *Marion* Court of Common Pleas. Monday,  
May 28.

HANNA, J.—*Gulick* filed his complaint and affidavit, averring the same facts involved in the case of *Waldo v. Wallace*, 12 Ind. R. 570; and, in addition, that he, *Gulick*, received all the votes cast at said election, in *October*, 1858, for the office of sheriff, other than those cast for said *William J. Wallace*; that on the 29th of *June*, 1859, the

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governor of the state issued to him a commission, &c.; and that, on the same day, he took and subscribed the requisite oath, indorsed thereon, and executed, together with sufficient sureties, the bond required by law, &c., and presented the said bond to the defendant, as clerk, &c., to be by him approved, which official duty he refused to perform; wherefore, a mandate is prayed, &c.

The defendant demurred to the complaint, because, upon its face, it shows that *Wallace* was performing the duties of sheriff *de facto*, under color of law, and, therefore, the writ of mandate is not the proper remedy to determine the title to the office, and there is another and ample remedy to determine that question; and because it appears upon the face of said complaint that the plaintiff was not duly elected to the office of sheriff at said election.

The demurrer was sustained.

The demurrer admits the truth of the matters set forth in the complaint, which are well pleaded. The facts set forth bring this case within that of *Waldo v. Wallace*, *supra*; and that case, therefore, determines the first question that arises in this, namely, that *Wallace*, the person shown by the record to have been the competitor of *Gulick*, was ineligible to the office of sheriff at the date of the election.

The demurrer also admits that the complainant received all other votes cast at the election, except those received by *Wallace*, who was ineligible; that a commission had issued to him; that he had taken the oath, &c., and tendered a sufficient bond, the approval of which was refused by the defendant.

The simple inquiry presented to us upon the record, is, what was the official duty of *New*, upon this state of facts? and if he refused to discharge that duty, what is the remedy of the complainant?

As the demurrer concedes that *Wallace* was not eligible to be elected to the office of sheriff, for a limited time, for the reasons given in the record, namely, because he was prohibited from holding any office under the state, other than a judicial office, during that time, by the constitu-

tion, we cannot perceive the force of the argument advanced by the defendant to sustain his refusal to approve the bond herein, to-wit, that *Wallace* was already inducted into the office, and acting as sheriff; and, therefore, because he was and is wrongfully exercising the duties of the office, affords a sufficient reason for the refusal of the defendant to act. This reasoning is not valid. The clerk is a mere ministerial officer; and in respect to the approval of bonds, which it is made his duty to approve, he has no discretion other than to determine whether the security offered is sufficient. Was it his duty to approve this? The records, of which he is, by law, the keeper, show that but two candidates were voted for at the election for sheriff. The record in this case shows that he was not only constructively, but in fact, cognizant of that, for it contains his official certificate to that effect, and giving the vote of each. It is true, that his records also show that the board of canvassers had certified and declared that *Wallace* was elected; but this certificate is not, under the circumstances of this case, any shield for him in his refusal to act; because he admits, by his demurrer, that *Wallace*, the person therein named, is totally and absolutely ineligible to the office, by virtue of the constitutional prohibition already adverted to.

Looking, then, to the powers and duties of a clerk, and to this case as presented to us on the pleadings, we are of opinion that such a *prima facie* right to the office was made, as entitled the complainant to the privilege of filing his bond, and such as made it the duty of the clerk to act officially in the approval thereof.

In this view of the case, we do not take notice of the fact, nor stop to inquire whether it was the duty of the clerk to take notice, that the highest judicial tribunal in the state had declared the ineligibility of *Wallace*. The facts upon which that ineligibility rests, and the conclusion to that effect, are fully stated in the complaint; and the facts, if not the conclusion deduced therefrom by the pleader, are admitted by the defendant, by his demurrer,

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NEW.

to be true, and the conclusion appears to be silently conceded in the brief of the appellee.

It is urged by the appellee that the action of the board of canvassers of the returns of the election, and the certificate of the clerk based thereon, are the only basis upon which the governor can act in issuing a commission, and it is assumed that he had issued one commission upon such evidence, to-wit, to *Wallace*, and that he had thereby exhausted his power in that behalf.

In *Collins v. The State*, 8 Ind. R. 344, it is, in effect, decided by this Court that the secretary of state was not concluded by the action of the governor in issuing a commission, but, when called upon to approve a bond, might determine for himself whether there was a vacancy to be filled, &c. The reasoning offered in support of that decision, would, it appears to us, sustain the governor in determining, even against the decision of a board of canvassers, as to whether an applicant is entitled to a commission or not, where the objection to his right to receive it rests upon the ground that a constitutional prohibition is interposed.

As to the second branch of the objection. It is made the duty of the governor to issue commissions in certain cases, and to certain officers. The sheriff is one of the officers that thus receives a commission upon his election; and we have no doubt that if the governor should ascertain that he had, through mistake or otherwise, improperly issued a commission to one person to fill that office, when in truth it ought to have been issued to another, he may correct the error by issuing one to the person legally entitled thereto.

In the case of *The State v. Johnson*, 17 Ark. R. —, an election had been held for the office of mayor, &c. *Johnson* received the certificate of election from the board of canvassers, and the governor of the state commissioned him, and he was in the discharge of the duties, &c. *Rogers*, his opponent, contested the election before the tribunal provided for hearing, &c., which board decided in

his favor; and upon the governor being properly informed thereof, he also issued a commission to him, &c. The Court say: "After the close of the election, *Rogers* was, to all intents and purposes, mayor *de jure*, and so soon as he was commissioned by the governor, and proceeded to act thereunder, he became mayor *de facto*, and the commission, which had been issued to appellee by the governor, became, and was from that time, virtually destroyed, canceled, and superseded; so that if he continued to act as mayor after that time, he was a naked officer *de facto*, without the commission to give color to his acts as such." The Court did not decide in that case, nor do we decide in this case, as the question is not directly before us, whether the acts of a naked officer *de facto*, acting without color of office, are merely irregular, or whether they are not absolutely void.

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Whether *Gulick* is shown to have been entitled to such commission, remains to be examined. It being conceded that the votes cast for *Wallace* were powerless and fruitless, in effecting the main end arrived at, that is, in electing him, we are still asked to decide that they were so far effective as to prevent the election of any other person; that they were, so far as affirmative results were involved, thrown away, but that negatively they were operative. We are reminded that in our form of government, the majority should rule, and that if the course indicated is not followed, a majority of the voters may be disfranchised, their voice disregarded and their rights trampled under foot, and the choice of a minority listened to. True, by the constitution and laws of this state, the voice of a majority controls our elections; but that voice must be constitutionally and legally expressed. Even a majority should not nullify a provision of the constitution, or be permitted, at will, to disregard the law. In this is the strength and beauty of our institutions. Suppose a majority should persist in voting for a man totally ineligible to take the office of sheriff, what would be the result? As he could not hold the office, either the one capable of holding, receiving the next highest vote, would, as con-

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tended by the appellant, be entitled to the office, or there would be a vacancy, as insisted by the appellee. Suppose the proceedings should result in creating a vacancy, then it would remain, greatly to the detriment of public and private interests, or it would, under the statute, have to be filled by the action and choice of, perhaps, two men, which might be, possibly, in direct conflict with the choice of that majority, in every respect. Then, whilst it is true that the votes of a majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse, or negligently fail, to express their choice, those, although a minority, who should legitimately choose one eligible to the position, should be heeded. Suppose that, eight years ago, at the first election under our new constitution, when nearly all the offices in the state were to be filled, a majority of the voters in the state, and in the several districts and counties, had voted for persons wholly ineligible to fill the several offices, would those offices have thereby remained vacant? Could that majority, by persevering in that course, have continued the anarchy that might have resulted from such action? Or, rather, is it not the true theory that those who act in accordance with the constitution and the law, should control even a majority who may fail to so act? Whether the same reasoning would hold good where the ineligibility should arise out of some cause other than a constitutional prohibition, is a question we are not now called upon to decide.

We are aware that, as to the question herein decided, there are authorities apparently contradictory, and, therefore, we have attempted to look at the reason of that class we are disposed to follow.

But had the voters notice of the ineligibility of *Wallace*? By one party it is insisted that constructive notice is sufficient; by the other, that it must be actual. It is averred and admitted that, by virtue of his election as mayor of the city of *Indianapolis*, *Wallace* had assumed to discharge the duties of that station, and that among those duties was the

right to hear, &c., all prosecutions, under the laws of the state, for crimes and misdemeanors committed within the county of *Marion*. In other words, that in the capacity in which he then acted, the jurisdiction of his Court was co-extensive with the said county.

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NEW.

The statute conferring this jurisdiction was a public act, of which all citizens of the county were bound to take notice. Whether others, not citizens, should be chargeable with such notice, we need not decide. It is true the act contained a provision by which the common council might deprive the mayor of that jurisdiction, by ordering the election of a city judge. Acts 1857, p. 42, §§ 9, 18. But it is averred in the complaint that this was not done; and it is charged that, by virtue of said statute, he was authorized to, and did, take upon himself and exercise the duties of said office of judge of the city Court, by virtue of his election as mayor.

The case stands thus: A general law conferred such jurisdiction upon the mayor as made him a judicial officer. This jurisdiction might (at certain times,) be, by order of the council, conferred upon another. As before stated, citizens of the county were chargeable with notice of the statute. No conflict appears between the mayor and any other person as to the discharge of the duties arising under the statute. He was, as appears by the pleadings, a judicial officer in law, as well as in fact. We are not, then, able to perceive any sound reason why the voters of the county were not chargeable with notice of these facts. They were amenable to his jurisdiction. Subject to be arraigned before him and punished for any infraction of the specified laws. The theory is that every man is bound to know the law; certainly then, every voter, at least within his jurisdiction, was bound to know that the statute gave the mayor certain powers. Courts would be compelled to take notice of who was the incumbent of the office of mayor during the time he discharged judicial functions under the laws of the state, and we are not able to see any good reason leading to the conclusion that citizens, within the jurisdiction

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NEW.

of a judicial office, are not also chargeable with notice of who is the incumbent of that office.

We are of opinion that, so far as the pleadings in this case show, the voters of *Marion* county had sufficient notice of the fact that *Wallace* had been elected to a judicial office, and had taken upon himself the duties thereof, the term of which had not expired at the time an attempt was made to confer upon him the office of sheriff. The votes then given, or attempted to be cast for him, for that office, were ineffectual for any purpose. They had no more effect, in a legal point of view, than if they had been cast for a dead man, or for one who never had a being.

We are further of opinion that upon the face of the pleadings, for the reason heretofore given, it is shown that the governor had authority to issue the commission to *Gulick*, and that it was the duty of the clerk to approve his bond. We have treated these points at some more length than we otherwise would have done, because of the decision in *Collins v. The State*, herein cited, in which it was held that the secretary of state was not compelled to approve a bond in a case where a commission had been issued without authority. We have therefore looked to see whether there was authority justifying the issuing of this commission.

As the clerk thus failed to discharge his official duty, it only remains to examine whether the proper remedy has been sought. It is insisted that this is not the appropriate mode of bringing before the Court the question of title to the office.

The statute is (2 R. S. p. 197), that "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins; or, a duty resulting from an office, trust, or station." Among the official duties of a clerk is that of approving (Acts 1857, p. 19; 1 R. S. p. 166) and filing the bond of a sheriff. 2 R. S. p. 9.

The appellee, as clerk, having failed in the discharge of that duty, subjected himself to be proceeded against under this statute; and, in considering whether the governor had



authority to issue the commission to the appellee, and what was his duty and liability in the premises, we have, as before intimated, been compelled, necessarily, to incidentally discuss and decide the question of title to the office in the appellee, Mr. *Gulick*, as shown by the record.

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The demurrer should have been overruled.

PERKINS, J.—Upon the decision of this cause below, the Court delivered an elaborate opinion. Fully persuaded that that opinion is erroneous, I feel impelled by the respect I entertain for the memory of its author, the late Judge WALLACE, and the reluctance with which I disagree to his judgment, to give my reasons why it should be reversed.

*Wallace* and *Gulick* were opposing candidates for the office of sheriff of *Marion* county, *Indiana*. *Wallace* received the certificate of election from the board of canvassers, and obtained his commission from the governor.

His election was contested, and he was decided ineligible to the office. *Gulick* then obtained a sheriff's commission from the governor, upon a certificate that he received a greater number of votes at the election than any other candidate except *Wallace*. He tendered his bond to the clerk, &c., but the clerk refused to act in the premises, whereby *Gulick* was prevented from entering upon the discharge of the duties of the office of sheriff.

*Gulick* then applied to the Common Pleas for a mandamus to compel the clerk to act, &c. The mandamus was refused, and an appeal was prosecuted to this Court.

The ground upon which the Court refused the mandamus, was, that *Gulick* was not elected sheriff. The Court admitted that *Wallace* was not sheriff, because, at the time he was voted for as a candidate for that office, the term had not expired for which he had been elected to a judicial office under the laws of the state of *Indiana* (*Waldo v. Wallace*, 12 Ind. R. 569), which fact rendered him, at the time he was voted for for sheriff, ineligible to that office; but the Court held that the legal consequence of

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1860.

GULICK  
v.  
NEW.

such ineligibility of *Wallace* was, not the election of *Gulick*, but the election of no one, the election, indeed, of blank; and the question now to be considered and decided is, was the Court below right in its conclusion? was the election a failure, or was *Gulick* elected sheriff?

The discussion of the question may be by way of stating propositions:

1. Where, at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but from a fact or cause which the voters did not and were not bound to know; the result is a failure, and gives no candidate the right to the office, and should be followed by another election.

Probable examples, under this proposition, of cases where the voters might not have knowledge, viz.: infancy of candidate; non-residency; want of naturalization; not of male sex; not of requisite degree of white blood; not in existence. This last was the fact in the case cited from 38 Maine R. app. There, a portion of the people, by mistake, voted for a person not in being. The case of *The State v. Swearingen*, 12 Geo. R. 23, was a case of non-residency.

2. Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know, of the ineligibility of a candidate, the election does not result in a failure; but, in such case, the eligible candidate receiving the highest number of votes is legally elected, and entitled to the office.

Against this proposition we have not found a single authority. Those relied on as such by the Court below, were the cases in 38 Maine R. and 12 Geo. R. *supra*, and *The State v. Giles*, 1 Chand. (Wis.) R. 112.

Of the case in *Maine*, we have said enough above.

Of the cases in *Georgia* and *Wisconsin*, it may be remarked, that neither of them involved the point now under consideration, and what is said upon it is mere *dicta*, and neither of the cases cites a single authority.

The point involved in the *Georgia* case was, whether a certain corporate town in that state could elect to office in

it a person not residing within the corporate limits, and it was held that it could. This closed the case.

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1860.

The point involved in the *Wisconsin* case was this. The constitution, art. 6, § 4, provided that sheriffs should "be ineligible for two years next succeeding the termination of their offices." A sheriff, in office at the time the constitution was adopted, was elected his own successor under the constitution; and it was held that he was legally elected, and that the disability imposed by the constitution related only to elections and terms held under the constitution. The decision of this point disposed of the case, and what is said beyond it, as in the *Georgia* case, is not improperly, but still is very loosely and carelessly said, and is not binding as authority.

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NEW.

But while there are no authorities adverse to the second proposition above laid down, there is a cloud of them vindicating its correctness. As the attention of the Court below does not appear to have been called to them, we shall here indicate where they may be found and examined.

Mr. GRANT, a late, accurate *English* writer on Corporations, at p. 208, says: "As has been stated, a disqualification patent or notorious, at once causes the votes given for the candidate laboring under it to be thrown away; the same would probably be held to be the case where the electors had the means of knowledge of the candidate's qualification, or the contrary, and might have ascertained the facts if they had pleased." Numerous cases are cited to sustain these positions.

Judge CUSHING, in his *American* work on the Law of Legislative Assemblies, at pp. 66, 67, lays down the same doctrine as deducible from the decided cases.

3. Where the ineligibility of a candidate arises from his holding, or having held, a public office, the people within the jurisdiction of such office, are held in law to know—are chargeable with notice—of such ineligibility; the votes given for such candidate are of no effect; and his highest eligible competitor is elected. Grant on Corp., *supra*, p. 107.—*Biddle v. Willard*, 10 Ind. R. 62, on p. 68.

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v.  
FISHER.

The Court below fell into error on this point by viewing *Wallace* simply in the character of mayor of *Indianapolis*. As mayor, he was simply a corporation officer, and, perhaps, necessarily known as such only within the city limits. But he was more than a city officer. He was a judicial officer, a judge of a Court, with jurisdiction coëxtensive with the county limits, created to administer the general laws of the state to the extent of his jurisdiction. In this capacity of judge, the people of the county were bound to know him, and were bound to know the disability, as to the right to hold other offices, which his character as judge brought upon him by the constitution and laws of the state.

The error of the Court below was as if a man were holding the offices of councilman of the city, and representative in the state legislature; and the Court, in judging of the question of eligibility to other offices, should look at him simply as a councilman, ignoring altogether his legislative office.

*Wallace*, then, at the time he was voted for for sheriff, was ineligible; the people knew it; the votes cast for him were thrown away, and *Gulick* was elected, and has, since the election, been *de jure*, at least, sheriff of *Marion* county.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Morrison, N. B. Taylor, J. E. McDonald, and A. L. Roache*, for the appellant.

*L. Barbour, J. D. Howland, and H. O'Neal*, for the appellee.

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BOWEN and Another v. FISHER.

Monday,  
May 28.

APPEAL from the *Shelby* Circuit Court.

*Per Curiam*.—This was an action to recover money, and to enforce a vendor's lien.

The complaint did not aver that the defendants were insolvent, nor that there was no personal property, nor any equivalent averment.

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1860.

HAMAR  
v.  
DIMMICK.

Denial. Trial. Judgment for plaintiff for the amount of the note, and that the same was a lien upon the land described, and order for its sale.

The only question in the case is as to whether the judgment, declaring the lien and for the sale of the land, should have been rendered in the absence of the before-mentioned averments.

On the authority of *Scott v. Crawford*, 12 Ind. R. 411, the judgment for the money, and declaring it a lien, is affirmed. The order directing the sale of the specific property, in the first instance, is reversed at the cost of the appellee.

*M. M. Ray*, for the appellants.

*E. H. Davis* and *C. Wright*, for the appellee.

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HAMAR v. DIMMICK.

APPEAL from the *Warren* Court of Common Pleas. *Monday, May 28.*

PERKINS, J.—*Dimmick* sold a wagon to *Hamar*, to be paid for by the delivery, at a certain time, of five hundred and fifty bushels of corn. This suit was brought to recover for an alleged failure to deliver the corn agreed upon.

Answer, in general denial, and in averment of a delivery of all the corn according to agreement.

Trial; judgment for plaintiff for 15 dollars and costs.

The judgment for plaintiff for costs was right. Payment in specific articles could be proved under the issues. Perk. Pr., 368.

The defendant further answered that he tendered simply what the corn to be delivered was worth, and no more, after he had failed to deliver the corn.

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1860.

LAUGHERY  
v.  
McLEAN.

This answer was bad. Ind. Dig., p. 787, § 17. The tender should, at all events, have included interest to time of tender. How. (N. Y.) Code, 238.

*Query*, are not general denial and tender inconsistent defenses? How. (N. Y.) Code, p. 238.—Perk. Pr., p. 226. *Walker* says they are. Am. Law, 3d ed., 579. See, also, as to inconsistent pleading, generally, Steph. Pl., 273, 274, and 1 Chit. Pl. 560.

And, again, has the code prescribed the mode in which tender must be made to bar costs, viz., by an offer to confess judgment? Perk. Pr., 89.

In this case, the plaintiff recovered one-third more than was tendered; hence, the tender could not bar costs.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*B. F. Gregory, J. Harper, and J. N. Brown*, for the appellant.

*R. A. Chandler*, for the appellee.

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LAUGHERY v. McLEAN.

In a suit upon a promissory note given for the purchase-money of land, an answer setting up a failure of title, without showing breach of covenant or fraud, is bad on demurrer.

Monday,  
May 28.

APPEAL from the *Wabash* Circuit Court.

WORDEN, J.—Complaint by the appellee against the appellant upon a promissory note.

The complaint alleges that the note was given in part consideration for the sale by the plaintiff to the defendant of a certain piece of land, and that the plaintiff delivered immediate possession thereof to the defendant, &c., and the plaintiff claims and seeks to enforce a vendor's lien on the land for the amount of the note.

The defendant answered by a general denial. He also

14	106
141	366
14	106
159	411

filed the following special answer, viz.: "And defendant, for answer to said complaint, alleges that said note was given, and is and was, without any consideration whatever, in this, to-wit, that the said plaintiff had not, at the time of the making of the alleged conveyance of the said premises named in said complaint, nor has he since had, any title or interest therein; and that in and by said conveyance, no title or interest therein passed to said defendants; wherefore," &c.

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1860.

LAUGHERY  
v.  
MOLEMAN.

A demurrer was sustained to the special paragraph, and exception was taken.

The cause was tried by the Court, and resulted in a finding for the plaintiff. The defendant moved for a new trial, but no written reasons appear to have been filed. The motion was overruled and judgment entered on the finding, giving the plaintiff a lien on the land mentioned for the payment of the judgment.

The appellant assigns for error the ruling on the demurrer; the overruling of the motion for a new trial; and the judgment that the plaintiff hold a lien on the land, &c.

There having been no written reasons filed for a new trial, we are not advised upon what ground it was asked, and could not disturb the finding, even were it not sustained by the evidence.

Objection is here also made to the form of the judgment as to the manner of enforcing the lien. If any objection exist in this respect, it should have been made in the Court below, which was not done. No question in this respect having been made in the Court below, it is too late to make it for the first time in this Court. *Manly v. Hubbard*, 9 Ind. R. 230.—*Wolcott v. Yeager*, 11 *id.* 84.

This brings us to the main question involved in the case, viz., was the demurrer to the special paragraph of the answer correctly sustained?

From the complaint and answer together, it is fairly to be inferred that the plaintiff had made a conveyance, purporting, at least, to convey to the defendant the land mentioned. It is not directly averred in the complaint that a conveyance had been made, but the answer admits the

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v.  
MCLEAN.

conveyance, and avers that no title passed thereby, the plaintiff having no title to convey.

The deed is not set out, nor is it averred in the answer that it contained any covenants of seizin, right to convey, or any other covenants whatever. If the deed contained any covenants that were broken, the original or a copy thereof should have been filed as the foundation of the defense (Code, § 78), and there should have been such facts averred as would show a breach of the covenants relied upon. It is not necessary for us here to determine whether the want of any title in the plaintiff, would be a breach of the covenant of seizin and right to convey, as long as the defendant was in the undisturbed possession of the land; as no covenants are set out or relied upon. For aught that appears, the conveyance was a mere quit-claim, without any warranty whatever; and in such case, in the absence of fraud, a want or failure of title cannot be set up in bar of the action for the purchase-money.

This doctrine is very clearly stated in the case of *Barkhamstead v. Case*, 5 Conn. R. 528. A bill in chancery was filed for relief against a promissory note. HOSMER, C. J., in delivering the opinion of the Court, says: "The ground on which the decree in this case was rendered by the county Court, undoubtedly was, that the promissory note to *Barkhamstead* was totally without consideration, by reason of the non-existence of the title to the land sold; and, therefore, that the note was fraudulent and void. If there was no fraud and no covenant to secure the title, the purchaser has no remedy for his money, even on failure of title, either at law or in equity. *Abbott v. Allen*, 2 Johns. Ch. 519.—*Chesterman v. Gardner*, 5 *id.* 29. The grantee of land, if he takes no covenants, and there be no fraud in the sale, has assumed on himself the risk of title; and any security given by him for the purchase-money, is on a legal consideration. The bill of the plaintiff charged no fraud, without which allegation fraud was not in issue; and from the facts exhibited in the finding of the Court, the entire case seems to have been, that *Barkhamstead* believed and affirmed that they had title, when, in fact, they



had none, and *Case*, confiding in the same, purchased the land in question, and gave in payment the note now in suit. The maxim *caveat emptor* peculiarly applies in this case. The defendant in error should have taken proper covenants to guaranty the title. In a matter embracing neither fraud nor covenant, the purchaser acts at his own risk, and voluntarily foregoes any remedy, if the title should fail."

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THE STATE.

No fraud is charged in the answer in the case at bar, and we are of opinion that the demurrer to it was correctly sustained.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*J. D. Conner*, ——— *Kidd, J. U. Pettit*, and *C. Cowgill*, for the appellant.

*J. M. Washburn*, for the appellee.

### CARPENTER v. THE STATE.

An information for keeping a house for gaming, is not bad for not giving the names of the persons who gambled.

An information must be based upon an affidavit first filed. It is not sufficient that the information itself is verified.

APPEAL from the *Steuben* Court of Common Pleas.

Monday,  
May 28.

HANNA, J.—This was a prosecution for keeping a house to be used for gaming. Motion to quash overruled; trial and conviction.

It is urged that the information is bad for two reasons—

1. Because it does not give the names of the persons who gamed.

This was not necessary under the peculiar form of the information. *Sowle v. The State*, 11 Ind. R. 493.—*Wine-miller v. The State*, *id.* 516.

2. There was no affidavit, other than a general one, attached to the information, verifying the truth thereof. Is

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AND HAMIL-  
TON RAIL-  
ROAD CO.

this sufficient, or ought an affidavit, separate from the information, to be first filed, to base such information upon?

2 R. S. p. 364.

We are of opinion that, looking to the provisions of the whole statute upon the subject of prosecutions by information, it was intended such proceeding should be based upon an affidavit first filed; and that it is not, therefore, sufficient that the information itself is merely verified.

The charges to the jury are complained of; but the view taken of the points above noticed renders it unnecessary to pass upon those charges.

*Per Curiam.*—The judgment is reversed. Cause remanded, &c.

*A. Ellison*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

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MORRISON v. THE EATON AND HAMILTON RAILROAD COMPANY.

A clause in the charter of a corporation authorizing the company to borrow money "on such terms as might be agreed upon between the parties," empowers them to borrow at a rate of interest beyond that established by the general law.

Monday,  
May 28.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—*Robert Morrison* sued the defendants upon a promissory note for 9,426 dollars, dated *November 30, 1854*, and due three years after date, with 12 per cent. interest.

The cause was submitted to the Court without a jury, and "the Court found for the plaintiff the principal of said note alone, and refused to allow any interest thereon, on the ground that the note was, on its face, usurious," and rendered judgment accordingly.

The plaintiff appealed, and alone assigns errors in this Court.

The only one relied on by the plaintiff here (and no cross-errors are assigned by the defendant), is the refusal to allow interest on the note.

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TON RAIL-  
ROAD Co.

The charter of the corporation that negotiated the loan was a special one, granted in 1846, and authorized the borrowing of money "on such terms as might be agreed upon by the parties."

And the question is, did that clause of the charter empower the company to borrow money at a rate of interest beyond that established by the general law of the state?

That the clause was inserted in the charter expressly to enable the corporation to borrow money on such higher rate of interest, we have no doubt; and if it failed to accomplish that end, its insertion was nugatory—powerless for any purpose whatever; for as to all other terms of the contract of loan, the general grant of power to borrow, perhaps, indeed, the simple creation of the corporation, would have been adequate. See *Smead v. The Indianapolis, &c., Railroad Co.*, 11 Ind. R. 104. We know historically that at the time the charter in question was granted, money could not be obtained by such corporations at 6 per cent., the legal rate of interest; and, hence, in the application for charters, special powers on the subject were usually sought. They were sought expressly to enable the corporations to give a rate of interest that would induce the loan.

And the rate of interest of a loan is certainly one of the most important of the terms upon which it is negotiated. It is embraced, therefore, by the strict letter, as beyond doubt it is, as we have shown, by the spirit, of the provision of the charter.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, with instructions to the Court below to render the judgment for an amount covering the principal due, with interest thereon at 12 per cent.

*J. S. Newman* and *J. P. Siddall*, for the appellant.

*O. P. Morton*, *W. A. Bickle*, *W. P. Benton*, and *J. F. Kibbey*, for the appellees.

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PETERSON.

THE NEW ALBANY AND SALEM RAILROAD COMPANY v.  
PETERSON.

If the owner of land make an excavation within his own premises, and thereby drain the well or subterranean spring of another, it is *damnum absque injuria*, and no action will lie.

Monday,  
May 28.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—Complaint by the appellee against the company for an injury to a lot belonging to the plaintiff, causing a well thereon to be drained by the construction of the defendants' road. Judgment for the plaintiff for 50 dollars.

The cause was submitted to the Court on the following agreed statement of facts: "It is agreed that the plaintiff is the owner in fee of the lot described, &c.; that the defendants, in the construction of their road under their charter, caused the said well mentioned in the complaint to be drained, dried up, and the water diverted therefrom, by means of which the plaintiff was damaged to the amount of 50 dollars. It is admitted that the railroad passes near to, but does not touch the real estate aforesaid, nor is any part thereof appropriated for the use of said railroad. It is further agreed that said damage was caused by the construction of said railroad, by the defendants, in the usual and proper manner of construction of such roads, and before the commencement or pendency of this suit, doing no unnecessary damage: the draining being caused by cutting off the underground springs or fountain which supplied the well, in excavating for the road-bed of their railroad. It is agreed that if the law is with the plaintiff, on the above agreed state of facts, then judgment is to be rendered for the plaintiff for said sum of 50 dollars and costs; but if the law is for the defendants, then judgment shall be rendered for the defendants."

The question presented by the above facts agreed upon, is somewhat novel, important, and interesting. The rights of the owners of the soil to superficial streams of water

14	118
128	590
14	112
181	280

running thereon, are, by our law, pretty definitely known and understood. The elementary books abound in discussions on the subject, and the reports contain numerous adjudications upon it. But the same is not the case in reference to underground watercourses, and the rights of the parties in reference thereto. The reports are meager of decisions in respect to subterranean streams, and the elementary writers throw but little light on the subject.

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But in *Acton v. Blundell*, 12 M. and W. 324, the subject underwent a full examination. The action was brought by the plaintiff to recover damages for a disturbance of his right to the water of certain underground springs, streams, and watercourses, with a count for draining off the water of a certain spring or well. The defendants had cut off and diminished the supply of water in the well, by sinking a coal-pit on lands belonging to one of themselves. It was held that the plaintiff could not recover.

TINDALL, C. J., in delivering the opinion of the Court, after stating the case, says: "The question argued before us, has been, in substance, this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law, as that which applies to, and regulates, a water-course flowing on the surface." After stating the law in reference to streams running upon the surface of the earth, he proceeds: "And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then, undoubtedly, the defendants could not justify the sinking of the coal-pits, and the directions of the learned judge would be wrong. But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the

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two cases, and that they are not to be governed by the same rule of law."

The Court, after having discussed at length the reason and policy of the law, and having examined the civil as well as the common-law authorities, conclude their opinion as follows: "It is scarcely necessary to say that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted use of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but it rather falls within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purpose, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action."

The case of *Chatfield v. Wilson*, reported in 5 Am. Law Reg., No. 9, decided by the Supreme Court of Vermont, fully recognizes the doctrine of the above case; and the cases of *Routh v. Driscall*, 20 Conn. R. 533, and *Greenleaf v. Francis*, 18 Pick. 117, are cited as being substantially to the same effect.

The case at bar and the one above cited from M. and W. seem to be precisely alike in principle.

The railroad company, for the purpose of constructing their road, had the same right to excavate, within the limits of their right of way, that a private individual would have to dig upon his land for any purpose; and we know of no statute or principle which would hold them liable for an injury, such as that complained of, beyond the liability of a natural person for a like injury.

On the above authority, we are of opinion that upon the facts agreed upon, the appellee is not entitled to recover, and that the judgment below must be reversed.

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PRICE.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*H. W. Chase* and *J. A. Wilstach*, for the appellants.

*R. C. Gregory*, for the appellee.

### MARTINDALE and Others v. PRICE.

If the plaintiff fail to reply to a paragraph of the answer which would bar a recovery, the defendant has a right to judgment on the pleadings; but if he fail to assert that right in the lower Court by a proper motion, he cannot be allowed to avail himself in the Supreme Court of the facts admitted by the pleadings. ●

The transfer of a lease by assignment may be by a separate instrument, and such instrument, being a transfer of an interest in land, may be properly recorded; but it will not operate as constructive notice to a subsequent purchaser, if it fail to describe the premises, and define the term, or to contain language of description by which the original lease can be recognized as the thing transferred.

APPEAL from the *Franklin* Circuit Court.

Monday,  
May 28.

DAVISON, J.—This was an action to recover a tract of land in *Franklin* county. The appellee was the plaintiff, and *William Gordon*, *Peter Woods*, and *Amos Martindale*, the defendants.

The complaint alleges these facts: *Gordon*, being the owner of the land in dispute, executed, acknowledged, and delivered to one *William P. Montague*, a bond and lease, which was, on the 11th of *September*, 1856, duly recorded in the recorder's office of said county. By the instrument thus executed, &c., *Gordon* leased the land to *Montague* for ten years, at the yearly rent of 25 dollars, binding himself, if *Montague* should pay 350 dollars at any time during the term, to convey the land. *Montague* took possession of the leased premises, and built thereon a tanyard,

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dwelling-house, and outhouses, worth 400 dollars. On the 25th of *September*, 1857, *Montague*, by a written instrument attached to a copy of the lease and bond, conveyed and transferred to the plaintiff all his (*Montague's*) interest in the tanyard and premises, which written instrument was, on the 30th of that month, duly recorded, &c. *Woods*, on the 5th of *November*, 1857, induced *Montague* to assign to him the original lease and bond; and on the 1st of *February*, 1858, *Woods* assigned the same to *Martindale*. This second assignment was not recorded. *Woods* and *Martindale*, on the 5th of *February*, prevailed upon *Gordon* to convey the land to the latter by deed in fee simple, and the three, *Woods*, *Martindale*, and *Gordon*, had due notice of assignment to the plaintiff, and fraudulently combined to cheat him out of his title. The relief prayed is, that the deed to *Martindale*, and also the assignment to him, be annulled, and that the plaintiff recover possession, &c.

Defendants' answer contains three paragraphs—

1. They deny all the allegations in the complaint, except the several assignments to *Woods* and *Martindale*, and the deed to the latter.

2. They set up the execution of the bond and lease to *Montague*, and aver that he employed *Woods* to erect on the leased premises a tanyard, dwelling-house, and out-buildings; that *Woods* furnished the materials and made the improvements, and, in addition, supplied *Montague* with various sums of money, and thus he became indebted to him 1,500 dollars; that in order to discharge this indebtedness, *Montague* transferred the bond and lease to *Woods*, who had no knowledge of any transfer of the same to the plaintiff; and that *Woods*, on the 1st of *February*, 1858, transferred all his interest in the bond and lease, and in the premises, to *Martindale*, who paid to *Gordon* the 350 dollars specified in the bond, and received from him a conveyance in fee simple. It is averred that these transactions were *bona fide*.

3. That the assignment of the bond and lease made upon a copy of the same, as set up in the complaint, was



intended by the plaintiff, when he procured it, to defraud *Woods*, who had made the improvements, and to cheat him out of the money, means, and labor which he had expended thereon; and that the assignment was only made as collateral security for a pretended claim of 250 dollars, set up by the plaintiff against *Montague*, which claim has been fully paid.

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Demurrer to the second paragraph of the answer sustained. To the third there was no reply.

Verdict for the plaintiff, upon which the Court, having refused a new trial, rendered judgment, &c.

The record contains the evidence. It consists of the bond and lease, of the various assignments on these instruments as set forth in the pleadings, and of the deed from *Gordon* to *Martindale*.

But the appellants contend that the facts alleged in the third paragraph of the answer were an effective bar to the action, and having passed without a reply, they stood admitted upon the record, and, consequently, no valid judgment could be rendered against the defendants.

The code says that when the answer contains allegations of new matter, the plaintiff may reply; but when he fails to reply, and the new matter set up in the answer, if material, stands uncontroverted, it shall, for the purposes of the action, be taken as true. 2 R. S. pp. 42, 44, §§ 67, 74.

In *McCarty v. Roberts*, 8 Ind. R. 150, it was held that the new matter constituting a defense under the code, means some fact which the plaintiff is not bound to prove, in the first instance, to establish his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint. *Norman v. Norman*, 11 Ind. R. 288.—*Stoddard v. The Annual Conference, &c.*, 12 Barb. 573.

As has been seen, the third paragraph alleges, substantially, that the assignment of the lease to the plaintiff was procured by him with intent to cheat and defraud *Woods* out of his money and labor expended in improving the leasehold premises, and was made by *Montague* as collate-

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ral security for a debt of 250 dollars, which had been paid, &c. Now these are allegations of new matter, and they are material, because, if they are true (and in the absence of a reply they must be conceded to be so), the plaintiff has no available title to the premises.

But the appellee insists that error, upon the admission of the facts stated in the third paragraph, is not assignable in this Court, because no such error was pointed out to the Circuit Court.

The plaintiff having failed to reply to this paragraph, which was a bar to his recovery, in effect admitted that he had no cause of action, and the statutory rule is, that where, upon the statements in the pleadings, one party is entitled by law to a judgment in his favor, judgment shall be so rendered by the Court, though a verdict has been found against such party. 2 R. S. p. 121, § 372.

Thus it will be seen that the defendants had a right to a judgment on the pleadings; but having failed, in the lower Court, to assert that right, the inquiry arises, can they assert it in this Court?

We have often decided that causes should not be reversed on questions never raised in the Court below. 5 Ind. R. 300.—8 *id.* 96.—9 *id.* 421.—10 *id.* 5. There may be an exception to this rule, viz., where the record on its face shows that the lower Court had no jurisdiction of the cause or the parties. But we perceive no reason why it should not be applied in the case before us. Under the enactment which we have quoted, the defendants could have moved in arrest of judgment, or for a judgment *non obstante veredicto*. But having omitted to make either motion in the Circuit Court, they cannot be allowed to avail themselves in this Court of the facts admitted by the pleadings. *Willey v. Strickland*, 8 Ind. R. 453.

As we have seen, the complaint avers notice to *Woods*, *Gordon*, and *Martindale*, of the assignment to the plaintiff. This the answer denies, and there being no evidence tending to prove actual notice, the plaintiff, in support of the affirmative of that issue, relies upon the registry of the assignment to him by *Montague* as constructive notice.

That assignment, as has been seen, was by a written instrument attached to a copy of the lease. The instrument was recorded *September 30, 1857*, and the record of it, as given in evidence, reads thus:

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"Know all men that I, the within *William P. Montague*, the lessor, for the consideration of 275 dollars to me in hand paid by *Nathaniel Price*, have granted, assigned, and set over, and by these presents do grant, assign, and set over to said *Price*, the within indenture of lease, and all the leasehold estate thereby demised, with the appurtenances, and also all my estate, right, title, and term of years yet to come, of, in, and to the same, to have and to hold the said messuage, unto the said *Price*, for the time yet to come in said lease, under the yearly rents and covenants within reserved and contained, on my part to be done, kept, and performed. In witness whereof, I have hereunto set my hand and seal, this 25th of *September, 1857*.  
*William P. Montague.*"

It may be noted that the copy of the lease to which this instrument of assignment was attached, never was recorded; but the instrument alone was on the record when the original lease was assigned to *Woods*. Hence, the inquiry arises, was the assignment, so on record, constructive notice to him? If it was not, then he was, in view of the case made by the record, a purchaser for a valuable consideration without notice, and the issue should have been found for the defendants; because, as we have seen, there was no evidence tending to prove actual notice. No doubt the transfer of a lease by assignment may be by a separate instrument; and such assignment being a transfer of an interest in lands, is a thing proper to be recorded.

But it is said that the registry of this assignment did not operate as notice, because it does not describe the leased premises, or define the term, nor does it use language of description by which the original lease can be recognized as the thing transferred. We are inclined to the opinion that this position is correct. A recorded instrument, in order that it may operate as constructive

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notice, should itself describe with certainty the subject-matter to which it relates, or it should refer to another recorded instrument in which such certain description may be found. Here, the assignment simply refers to the copy of a lease; but does not say whether the original from which that copy was made, was or was not recorded; and it seems to us that *Woods*, had he searched the records, at any time, prior to his purchase, could not have discovered that the leasehold which he proposed to buy, had been sold to any one.

We are of opinion that the record in question is not operative as constructive notice, and the result is, the averment in the complaint of notice to the defendants, is not sustained by the evidence. It follows that the verdict was erroneous, and a new trial should have been granted.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*L. Barbour* and *J. D. Howland*, for the appellants.

*G. H. Holland*, for the appellee.

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### JONES v. THE STATE.

The concealment of "the fact of the crime" which suspends the operation of the statute of limitation, must be a concealment of the fact that a crime has been committed, unconnected with the fact that the accused was the perpetrator.

Such concealment must be the result of positive acts done by the accused, and calculated to prevent a discovery that the offense has been committed. And the indictment must specifically charge such acts of concealment.

Monday,  
May 28.

APPEAL from the *Bartholomew* Circuit Court.

DAVISON, J.—This was a prosecution for grand larceny, commenced *April* 19, 1859.

The indictment charges that the defendant, on the 3d of *September*, 1856, at the county of *Bartholomew*, one mare, of the value of 150 dollars, of the personal property of

*George W. Mounts*, then and there being found, feloniously did steal, take, lead, drive, and ride away. And further, that the defendant, from the said 3d of *September*, 1856, till the 1st of *January*, 1859, did conceal the fact of the larceny aforesaid.

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THE STATE.

The defendant moved to quash the indictment; but the motion was overruled, and he excepted.

As has been seen, this prosecution was commenced *April* 19, 1859, more than two years after the larceny is alleged to have been committed. The indictment was, therefore, barred by the statute of limitations, unless the averment that defendant concealed the fact of the crime is effective to prevent such a result.

Section 13 of the statute to which we have referred, provides thus: "If any person who has committed an offense is absent from the state, or so conceals himself that process cannot be served upon him, or conceals the fact of the crime, the time of absence or concealment is not to be included in computing the period of limitation." 2 R. S. p. 363, § 13.

As we construe this provision, the words "conceals the fact of the crime," must be held to mean the concealment of the fact that a crime had been committed, unconnected with the fact that the accused was the guilty perpetrator; and further, the enactment evidently intends that the concealment of the fact of the crime must be the result of positive acts done by the accused, and calculated to prevent a discovery of the fact of the commission of the offense of which he stands charged.

This exposition being correct, and we think it is, the inquiry arises, is the averment, simply that the defendant "did conceal the fact of the larceny," sufficient, without alleging any specific act done or means used by him to produce such concealment?

In *Bowles v. The State*, 13 Ind. R. 427, the charge was, that *Bowles*, having unlawfully brought a negro woman named *Polin* into this state, did unlawfully encourage her to remain in the state, contrary, &c. *Held*, that the charge of encouragement, though it follows the statute, is too

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vague. The particular acts of encouragement should have been stated. This decision, it is true, relates to the particular acts which constitute the offense; still the principle upon which that case was decided may well apply to the point under consideration; because it seems equally essential that the positive acts which constitute the concealment of the fact of the crime should be stated. Unless the state, by her pleading, apprises the accused of the acts of concealment upon which she intends to rely, he may not be prepared to resist the effort to deprive him of his right to set up the statute of limitations in bar of the prosecution.

We are unanimously of opinion that the motion to quash should have prevailed.

The defendant having pleaded not guilty, the cause was submitted to a jury, who found for the state; and the Court, having refused a new trial, rendered judgment, &c. For the error in its refusal to quash the indictment, this judgment must be reversed.

*Per Curiam.*—The judgment is reversed. Cause remanded, &c.

*F. T. Hord*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

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*Ex Parte* DUNN.

Tuesday,  
May 29.

APPEAL from the *Elkhart* Circuit Court.

*Per Curiam.*—*James Dunn* applied to the board of county commissioners for license to retail spirituous liquors. He proved his moral character, &c., and offered a compliance with the requisitions of the law. License was denied him. He appealed to the Circuit Court. The appeal was dismissed, on the ground that the case was not appealable.

Under the law, if *Dunn* showed himself to fall within the class of those entitled by its provisions to license, and

license was denied him, he was cut off, by the action of the commissioners, from the exercise of a legal right, involving a pecuniary interest. Such decision was a legal grievance to him, and, under the general statute, entitled him to an appeal.

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DRAPER<sup>T</sup>  
V.  
THE STATE.

The judgment is reversed. Cause remanded, &c.

*H. Kilbourne*, for the appellant.

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DRAPER V. THE STATE.

Under the present liquor law, a remonstrant against the issuing of license to retail, cannot appeal from the decision of the county board as to the fitness of the applicant. The general act (1 R. S. p. 229) does not apply.

APPEAL from the *Wayne* Court of Common Pleas.

Tuesday,  
May 29.

PERKINS, J.—*Paul Draper*, of the city of *Richmond, Indiana*, applied to the commissioners of *Wayne* county, at one of their regular sessions, for a license to retail spirituous liquors on a certain lot, upon a certain street, in said city. He proved publication of notice.

One *Edwin M. Cook* availed himself of the privilege, allowed by statute to any and every citizen of the township, to remonstrate against granting license to *Paul*, because of his unfitness to conduct the business of retailing; but the board of commissioners, being satisfied that *Paul* had the moral fitness required by the statute, granted the license. *Paul* filed his bond with the auditor, which was approved; and further, he promptly complied, on being "requested to pay to the treasurer of said county 50 dollars, as a fee for license for one year, to be applied and expended for common school purposes;" took the treasurer's receipt therefor, and filed the same with the auditor, together with the order of the board granting the license, and upon them demanded the license; but the auditor, in response to the demand, informed *Paul* that the remonstrant,

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*Cook*, had filed with him an appeal-bond in the cause, and that he should, therefore, not comply with the demand for license.

*Paul* went home and commenced retailing; whereupon *John H. Popp*, Esq., the district attorney, commenced popping at him writs upon informations filed, charging him with violations of law. *Paul* defended on the ground that no such appeal lay in the case; and, hence, that that attempted to be taken, did not suspend his right to retail under the order of the board; and, on this point, we concur in opinion with him.

The liquor act requiring the license, does not provide for an appeal; and we do not think the general provision in 1 R. S. p. 229, allowing appeals from decisions of county boards to any person aggrieved, applies to the case. We think that section allows appeals only to parties having a pecuniary or other interest, beyond a mere moral one. So of the provisions allowing appeals in cases of highways. 1 R. S. pp. 312, 314. Such have been the cases in which appeals have been allowed under similar statutes. Ind. Dig., p. 120. Private property is taken for highways; they belong to the public, and involve taxation of all the citizens. In cases of contested elections, appeals are allowed. In these, legal and constitutional rights are involved, and appeal is specially authorized, not claimed under the general statute. 1 R. S. p. 272. But the appeal in these cases must be taken in ten days. *Ibid.*

Under the liquor law, the retailing of spirituous liquor is made legal. The traffic is sanctioned by the state; the commissioners have only to determine upon the question of compliance, by those proposing to engage in it, with conditions precedent. In this question, it cannot be said that citizens generally have, in the legal sense of the term, a pecuniary interest, or one where a personal political right can be affected. These interests are in the great question of traffic or no traffic at all, in the article; not in the question of the particular individuals who shall carry on the traffic. As a cautionary measure, any person has a right to remonstrate against the moral character of an applicant



for license. This is for the purpose of producing, on the part of the board, a closer scrutiny into the character of the applicant; not to raise an issue, as in a civil cause, between the applicant and remonstrant, involving a jury trial, &c. It would seem that the granting of license is a ministerial act. See *The Board, &c. v. Spitler*, 13 Ind. R. 235.

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Again: It is manifest from the provisions and object of the statute that no appeal was contemplated in favor of persons having merely a social or moral interest in the subject.

The commissioners order the license upon bond filed and 50 dollars paid. It is imperatively made the duty of the auditor to issue it at once. He has no discretion; and upon the grant of license, the person to whom it is issued may immediately sell under it. Moreover, it issues upon a valuable consideration. The license is, in a sense, purchased. Now, the law allows an appeal, if it allows one at all, to be taken at any time within thirty days. But, in the meantime, the licensee has been selling, and the county has been using his money. Suppose an appeal taken after the business has been carried on under the license for twenty-nine days, and the grant of license reversed. Will it operate in the nature of an *ex post facto* law, rendering criminal all acts done under the license? Will it entitle the licensee to a return of his money and interest?

The very nature of the case shows that no appeal from a grant of license was contemplated. The fact is, the granting of license under the law, is a question between the applicant and the county; and the county can no more appeal from her own grant, than the state can appeal in criminal cases in the absence of an express statute providing for it.

If the license is refused where the applicant is entitled to it, a legal right is impaired, is denied, in fact, and the injured party should have redress by appeal or mandate; but on this point we need now make no examination.

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As the case at bar stands, the issuing of the license by the auditor was a mere ministerial act, and his failure to perform it must not work prejudice.

*Per Curiam.*—The judgment is reversed. Cause remanded, &c.

*W. A. Bickle* and *C. H. Burchenal*, for the appellant.

*J. H. Popp*, for the state.

14	196
125	64
14	126
134	286
14	196
150	286

### McFARLAND and Others v. BIRDSALL and Another.

Where an affidavit for an attachment averred a fraudulent conveyance, an answer traversing the averment is not demurrable.

A reservation of the surplus to an assignor, where it is made to depend upon certain conditions to be complied with by the creditors, and particularly upon the condition of releasing the debtor, will avoid the deed of assignment; but the creditor may be excluded from the benefit of the fund, unless he abide the assignment and await the closing of it, for any balance that may be due him after the fund is exhausted, and the fund may be applied upon claims of other creditors, without rendering the deed fraudulent *per se*. In the absence of the requirement of a release from the creditor, the mere hypothetical reservation of the surplus to the debtor will not vitiate the assignment.

Where the deed is legal on its face, evidence tending to show that the assignment was an honest transaction is admissible.

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### APPEAL from the *Fayette* Circuit Court.

DAVISON, J.—The appellants, who were the plaintiffs, brought an action against *Birdsall* and *Thatcher* upon a promissory note for the payment of 1,243 dollars. The note bears date *March 29, 1856*, and was payable to the plaintiffs at six months.

At the commencement of the suit, one *Naham H. Burk*, as agent of the plaintiffs, and on their behalf, filed an affidavit alleging that upon said note there is indorsed two credits, viz., *April 6, 1857, 500 dollars; June 1, 1857, 500 dollars*; leaving a balance due thereon of 301 dollars, 86 cents; and that the defendants, *Birdsall* and *Thatcher*,

have sold and conveyed their property subject to execution, with the fraudulent intent to cheat, hinder, and delay their creditors.

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BIRDSALL.

Upon this affidavit, the plaintiffs having executed a written undertaking, as required by the statute, an order of attachment was duly issued against the defendants. And further, the proper affidavit having been made, a summons was duly issued against *Benjamin F. Miller* and others, (naming them) as garnishees.

Defendants answered the complaint, 1. By a general denial; 2. Payment; and in defense of the attachment, they deny that defendants have sold or conveyed their property subject to execution, with the fraudulent intent to cheat, hinder, or delay their creditors, and aver that whatever disposition has been made of their property, was for the benefit, and to promote the interest, of said creditors. This defense is verified by oath.

To the second paragraph, the plaintiffs replied in denial; and to the answer in defense of the attachment, they filed a demurrer, which was overruled; but the Court, upon the plaintiffs' motion, struck out that branch of the answer which begins with the words, "and aver," and ends with "said creditors."

The garnishees answered, in effect, that the several demands against them, and in favor of the defendants, had been, before the commencement of this suit, assigned by the defendants to one *Benjamin P. Miller*, and that by virtue of that assignment, they, the garnishees, are indebted to said *Miller*, and not to the defendants.

The issues were submitted to the Court, who found for the plaintiffs 303 dollars, the balance of the note sued on; and further, the Court found for the defendants and garnishees in the attachment, and, having refused a new trial, rendered judgment upon the finding, &c.

The first question to settle relates to the action of the Court in overruling the demurrer to the answer. There was no error in this ruling. The pleading to which the demurrer applied was, in effect, nothing more than a general traverse of the fraud charged in the affidavit, which led

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to an issue of fact, the affirmative of which the plaintiffs were bound to prove.

Upon the trial, the plaintiffs, in support of the averment that defendants had sold and conveyed their property with a fraudulent intent, &c., gave in evidence a deed of trust executed by defendants to said *Miller*. By this deed, they sold, assigned, and conveyed to *Miller* the entire stock of goods held and owned by them as partners, &c.; also all the notes, books, and book accounts appertaining to their store; and also certain real estate in *Fayette* county (describing it), the separate property of *Birdsall*, one of the partners; to have and to hold to said *Miller*, in trust, to be disposed of as he may deem most expedient, to pay and satisfy, as far as it may, the following notes due and owing by them: Here the deed sets forth and severally describes various notes, amounting, in the aggregate, to 4,764 dollars, and then proceeds: These notes, having been given for borrowed money, are hereby made preference claims, and the assignee is required to pay them, *pro rata*, and if the property so assigned be sufficient to pay them, and leaves a surplus, then such surplus is to be applied in payment of the following notes, which the deed also sets forth and severally describes, and which amount, in the whole, to 4,306 dollars. Appended to the deed, there is a schedule of the notes and accounts assigned to the trustee, amounting to 8,136 dollars. The deed stipulates "that any surplus remaining after the payment of the last-mentioned class of notes, is to be returned to the assignors;" and also contains this provision: "It is understood that, in case any creditor or creditors above named decline taking under this assignment, and wait the closing of the same for any balance that may be coming after the fund is exhausted, such creditor or creditors shall be excluded entirely from the benefits thereof, and all to be then applied to the other creditors abiding the assignment," &c.

The appellants contend that the stipulations just recited render the trust deed fraudulent in law, and this position, it is said, involves the main inquiry in the case.

BURRILL, in his treatise on Assignments, says: "A re-

reservation of the surplus to the assignor, where it is made to depend upon certain conditions to be complied with by the creditors, and particularly upon the condition of releasing the debtor, will avoid the deed." Bur. on Assign., 181. This rule, so far as it relates to the release of the debtor, has been recognized by this Court. *Henderson v. Bliss*, 8 Ind. R. 101.

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In this case, however, there is no condition requiring a release. The creditor, it is true, is excluded from the benefit of the fund unless he abides the assignment, and waits the closing of it, for any balance that may be due him after the fund is exhausted; and the fund, in case he fails to recognize the assignment, is to be all applied to the other creditors. This condition, it seems to us, ought not to be allowed to render the deed fraudulent *per se*. It does not coërcé the creditor into a relinquishment of his demand, nor does it reserve to the debtor the share to which the creditor would have been entitled had he become a party to the assignment.

Thus, it has been decided that a clause in an assignment authorizing the payment to the assignor of the surplus that might remain after the satisfaction of the debts of such creditors as should become parties to it, does not invalidate the assignment, as creditors not parties can pursue their remedies against the debtor, following the surplus either in his hands or those of the trustee. *Conkling v. Carson*, 11 Ill. R. 503.—*Livingston v. Bell*, 3 Watts, 198.—*The Mechanics' Bank v. Gorman*, 8 W. and S. 304.—*Shipwith v. Cunningham*, 8 Leigh, 271.—*Phippen v. Durham*, 8 Grattan, 457.—*Halsey v. Whitney*, 8 Mason, 206.—*Brown v. Lyon*, 17 Ala. R. 659.—*Dana v. The Bank*, 5 W. and S. 223.—*Bergin v. Bergin*, 1 Ired. 453.—*Beck v. Burdick*, 1 Paige, 305.

Upon the questions under discussion, the authorities are not uniform; but the weight of them evidently sustains the position that, in the absence of the requirement of a release from the creditor, the mere hypothetical reservation of the surplus to the debtor, will not vitiate the assignment. Indeed, there are decisions to the effect that such a

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reservation is in no case fraudulent *per se*, but only a circumstance from which a jury may infer the intention of the parties. *Estwick v. Cailand*, 5 T. R. 420.—*Bergin v. Bergin, supra*.

The evidence shows that some three or four of the defendants' creditors, whose claims in the whole amount to 150 dollars, are not named in the deed; and this, it is said, renders the assignment void; but these creditors are not complaining, and, moreover, it was sufficiently proved that their claims were omitted through mistake.

We are of opinion that the trust deed was not fraudulent in law; and whether it was so in fact, was a question for the Court sitting as a jury.

*Benjamin P. Miller*, the assignee, being on the stand as a witness, the defendants, on his cross-examination, propounded to him this question: "State whether, so far as you have any knowledge, information, or belief, the foregoing assignment was *bona fide* or fraudulent; and if fraudulent, what facts are within your knowledge to show it?"

Plaintiffs objected to the interrogatory thus propounded, on the ground that an answer to it would tend to contradict the deed; but their objection was overruled, and they excepted.

This exception is not well taken. As we have seen, the deed was legal upon its face, and evidence tending to show that, in point of fact, it was an honest transaction, instead of contradicting it, would be consistent with its legal effect. Similar objections were made to like questions propounded to other witnesses, which were correctly overruled.

All the evidence given in the cause is in the record. We have examined it carefully, and, in our opinion, it furnishes no sufficient proof of the fraudulent intent charged in the affidavit.

*Per Curiam*.—The judgment is affirmed with costs.

*B. F. Claypool*, for the appellants.

*S. W. Parker* and *J. C. McIntosh*, for the appellees.

CONWELL, PRESIDENT OF THE BANK OF CONNERSVILLE, v.  
HILL.

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The issuing of a note by a bank organized under the general banking law of 1852, and the receiving of it by the holder as money, is, in effect, a contract between the holder and the bank that the latter will pay it on demand; and upon the refusal of the bank to do so, it may be sued by the holder.

Section 8 of that act confers no power upon the auditor—the trust funds having been exhausted—to sue the bank for a balance due the note-holder.

The measures to be adopted by the auditor to prevent loss to note-holders, relate solely to the management of the stocks transferred to him by the bank.

The note-holder may sue the bank without in the first instance filing certificates of protest with the auditor—the stocks in the hands of the latter being merely collateral security.

There is nothing in the act requiring the auditor to delay the payment of such protested notes until all the notes issued by the bank have been deposited in his office.

In a suit against the bank, upon a failure to pay on demand, the notes, or a copy of them, should be filed with the complaint; and the fact that they are deposited in the auditor's office, does not excuse a failure to file them or a copy.

*It seems*, that the filing of one note, or a copy of it, of each denomination, with an averment that there were other notes, enumerating them, of like denomination, would be sufficient.

APPEAL from the *Fayette* Circuit Court.

Tuesday,  
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DAVISON, J.—The appellee, who was the plaintiff, brought three several actions in said Court against *Conwell*, as president of the *Bank of Connerville*. These actions were, at the *March* term, 1856, of that Court, consolidated, and, as one suit, proceeded to trial and final judgment.

The complaints allege substantially these facts: The *Bank of Connerville* was organized and went into operation under and by virtue of an act entitled “an act to authorize the business of general banking,” approved *May* 28, 1852; and the plaintiff, being the holder and owner of the circulating notes of said bank to the aggregate amount of 11,344 dollars, on the — day of —, in the year 1855, presented the same at her place of business for redemption and payment, which was then and there refused; whereupon he caused said notes to be protested for non-payment. A copy of the original certificate of protest was

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filed with the complaint, and made a part thereof. After this, on the 21st of *November*, 1855, the auditor of state, having converted the stocks and securities deposited in his office by the bank into money, the same was found insufficient to fully pay the notes issued by her, and remaining unredeemed; and having apportioned such proceeds, in the proportion they bore to the circulating notes of the bank, he ascertained that the same amounted to, and would only pay, 87 per cent. on such outstanding notes. It is averred that the plaintiff, on the last-named day, deposited and filed all the circulating notes so held and owned by him, with the auditor, in his office, and received from him the dividend of 87 per cent. on the above 11,344 dollars, and also his certificate that the notes had been deposited and the dividend paid. A copy of this certificate was filed with the complaint and made a part of it. After the payment of the dividend, there remained unpaid 13 per cent. of the aggregate amount of said notes, amounting to 1,474 dollars, for the recovery of which this suit was instituted.

Defendant demurred to the complaint, but his demurrer was overruled, and thereupon he answered. His answer contains a general denial, and seven special defenses. Demurrers were sustained to all the special defenses, excepting the sixth, to which there was a reply by a general denial.

The Court tried the issues and found for the plaintiff 1,474 dollars, and, having refused a new trial, rendered judgment, &c.

In support of the demurrer to the complaint, it is argued that the act under which the bank was organized does not contemplate the proceeding instituted in this case in the Circuit Court; but intends, in case of a bank failure, and a deficiency of funds from the sale of the securities held by the state to redeem her circulating notes in full, that other steps necessary to recover of the bank the balance due the note-holders should be taken by the state auditor. This position is, in our opinion, untenable. The issuing of the note and the receiving of it by the holder as money is, in effect, a contract between him and the bank that she



will pay it on demand; and upon her refusal to do so, she is plainly liable to be sued by the holder of the note. Indeed, the act itself provides that all persons having demands against such banking association may maintain actions against the president thereof, and all judgments against such president for any debt or liability of the association, shall be enforced against its joint property. 1 R. S. pp. 157, 158, §§ 23, 24. The failure to pay a circulating note when properly demanded, evidently creates a debt against the bank for which she is liable in a suit by the note-holder.

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But we are referred to § 8 of the same act, as sustaining the position assumed in favor of the demurrer. That section provides, in effect, that in case the makers of any such circulating notes shall, at any time, on lawful demand, fail to redeem such note, the holder thereof may cause the same to be protested for non-payment. And the auditor, on receiving and filing in his office such protest, shall forthwith give notice to the makers to pay the same; and if they shall omit to do so for thirty days after such notice, he shall immediately give notice in a newspaper published at *Indianapolis*, that all the circulating notes issued by such banking association, will be redeemed out of the stocks held by him for that purpose; and it shall be lawful for the auditor to apply the trust funds belonging to the makers of such protested notes, to the payment of such notes, with costs of protest, and to adopt such measures for the payment of all the circulating notes put in circulation by the makers of such protested notes, as will, in his opinion, most effectually prevent loss to the holders thereof. 1 R. S. p. 154. This provision, the trust funds having been exhausted, confers no power on the auditor to sue the bank for a balance due the note-holder. He is, it is true, required to adopt such measures as will, in his opinion, most effectually prevent loss to the holders of the notes; but these measures must be such as are consistent with his duties as prescribed by the act, and must relate to the management of the stocks transferred to him by the bank.

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The result is, the plaintiff has not, in this case, misconceived his remedy. Indeed, he might have sued the bank upon her direct engagements to pay the notes on demand, without in the first instance having filed with the auditor the certificates of protest; because the stocks of the bank are in his hands as mere collateral securities that she will redeem her circulating notes; hence, the note-holder may, at his option, sue the bank, or resort for payment to the trust funds in the hands of the auditor.

But it is said the complaint fails to allege a final dividend of the proceeds of the stock to all the note-holders, and is therefore defective. It does allege that the auditor having apportioned such proceeds, in the proportion they bore to the circulating notes of the bank, ascertained that the same amounted to and would pay only 87 per cent. on such notes, and that the plaintiff, on the notes which he deposited with the auditor, received of him the same per cent. These allegations seem to be sufficient. The auditor having apportioned the funds as alleged in the complaint, we think it became his duty to pay on the protested notes the portion to which they were entitled. There is, indeed, nothing in the letter or spirit of the act that required the auditor to delay payment on the plaintiff's demand until all the notes issued by the bank had been deposited in his office. At all events, the question whether the auditor has or has not done his duty in the application of the trust funds, cannot properly arise in this case. It is enough to sustain the purpose of the present suit, if the plaintiff has shown the amount paid on the notes which he deposited in the auditor's office.

As another ground of demurrer, it is assumed that the notes, or copies of them, should have been filed with the complaint. The code says the complaint shall contain a statement of the facts constituting the cause of action, in plain, concise language; and "when any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading." 2 R. S. pp. 37, 38, 44, §§ 49, 78. In view of these rules of prac-

tice, we have decided that the instrument sued on must be set forth in the complaint according to its legal effect, and in addition, the original instrument, or a copy of it, must be filed with that pleading; otherwise, it will be held objectionable, on the ground that "it does not contain facts sufficient to constitute a cause of action." *Price v. The Grand Rapids, &c., Railroad Co.*, 13 Ind. R. 58. Here the notes are evidently the basis of the action, because they alone contain the defendant's engagements to pay on demand; hence, there seems to be no valid reason why they, or copies of them, should not, in this action, as in a suit on an ordinary promise in writing, be filed with the pleading. Nor does the fact that the notes were deposited in the auditor's office excuse the defect in the pleading; because it is within the range of probability that copies of the notes could have been easily procured. Perhaps the filing of one note, or a copy of it, of each denomination, with an averment that there were other notes, enumerating them, of the same denomination, would have been sufficient. The last alleged cause of demurrer is well taken.

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Various questions relative to the special defenses to which demurrers were sustained, are raised by the appellant; but the questions thus raised are, in effect, the same as those which have been disposed of, and will not, therefore, be further noticed.

We perceive no error in the record, save that which relates to the failure to file with the complaint the notes sued on, or copies of them. For that error the judgment must be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. A. Fay* and *N. Trusler*, for the appellant.

*J. S. Reid*, for the appellee.

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SCOTT and Another v. HULL and Others.

SCOTT  
v.  
HULL.

14	136
141	163

To constitute an appearance, there must be some formal entry, or plea, or motion, and this must be of record, and can be tried only by the record. The appearance of defendants, a part of whom have not been served with process, at the taking of depositions to be used in the cause, was *held* not to be such an appearance as would defeat an application to remove the cause to the Circuit Court of the *United States*, under the act of congress of 1789.

Tuesday,  
May 29.

APPEAL from the *Tippecanoe* Circuit Court.

HANNA, J.—The appellees sued the appellants, in the *Tippecanoe* Circuit Court, laying their damages at 1,600 dollars. There was service upon one of the defendants; return of not found as to two others.

At the first term of the Court thereafter, the defendants, at their first appearance in term, filed their petition (verified by affidavit) and bond, and moved the Court to grant a removal of this cause to the *United States* Circuit Court for the district of *Indiana*.

The petition averred that the defendants were, at the time of the commencement of the suit, and still continued to be, citizens and residents of *Lucas* county, in the state of *Ohio*, and were not residents or citizens of *Indiana*.

The plaintiffs filed written objections to such removal, based upon the alleged ground that the defendants had appeared to the action previous to the time of making said application; namely, in appearing before an officer upon the taking of depositions by the plaintiffs, and also by said defendants taking depositions, to be used upon the trial of said cause, &c.

By bill of exceptions, it appears that these facts were established by evidence other than the record.

Did such acts constitute an appearance, within the meaning of the statute?

By the 12th section of the judiciary act, U. S. Statutes at Large, p. 79, it is enacted, "That if a suit be commenced in any state Court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds

the aforesaid sum or value of 500 dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such state Court, file a petition for a removal of the cause into the next Circuit Court, to be held in the district where the suit is pending, \* \* \* and offer good and sufficient surety for his entering, in such Court, on the first day of its next session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state Court to accept the surety and proceed no further in the cause," &c.

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v.  
HULL.

It will be observed that the petition provided for must be filed at the time of entering appearance in the state Court.

An appearance formerly signified the defendant's filing common or special bail. 1 Jac. L. Dict., p. 106. The appearance is effected on the part of the defendant (when he is not arrested) by his making certain formal entries in the proper office of the Court expressing his appearance, or, in case of arrest, by giving bail to the action. 1 Bouv. L. Dict., p. 107.—3 Watts and Serg., 501.—5 *id.* 215.—1 Scam. 250.—2 *id.* 462.—6 Port. 352.—8 *id.* 442.—9 *id.* 272.—6 Miss. R. 50.—7 *id.* 411.—17 Verm. R. 531.—2 Pike, 26.—6 Ala. R. 784.—*Shirley v. Hagar*, 3 Blackf. 226.—*Root v. Monroe*, 5 *id.* 594.—3 Ind. R. 196. In these two last cases, it was held that, under our practice, although special bail was given, to obtain a release of property attached, it was not such an appearance as precluded the defendant from moving, at the first opportunity, in term time, to quash the writ, &c.

We have no statute prescribing the acts that shall constitute an appearance in the Courts of the state. Our practice, therefore, corresponds with the rules of law arising out of the general principles above referred to; and we are, consequently, not called upon to determine whether the appearance mentioned in the statute of 1789, should be determined with reference to the general rules

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of practice which obtained at that time, by the common law, or such as might thereafter be prescribed by the legislatures of the several states.

By our statute, a service upon one of several defendants, enables the plaintiff to proceed against that one. Such was the condition when the plaintiffs, in the case at bar, proceeded, in the state of *Ohio*, to take depositions. The Court below found that all the defendants were, by themselves or attorney, present at the taking of these and other depositions. This was determined to be an appearance. If so, then the Court, without any service upon a portion of the defendants, or further appearance in Court, might have defaulted all of said defendants and rendered judgment for want of an answer, unless it should be determined that something more is necessary to constitute such an appearance, under our state statute, as would authorize a default, than would be necessary to make an appearance under the act of congress of 1789.

We are of opinion that the ruling was not a proper interpretation of our own code of procedure in that respect, nor of the statute herein quoted. There should be some formal entry, or plea, or motion, or official act (3 Blackf. 226) to constitute an appearance; and this should be of record, and tried by the record. 6 Com. Dig., 8.—*Kanouse v. Martin*, 15 How. (U. S.) 208.—3 Blackf. 226.

It follows that the Circuit Court erred, as well in the reception of evidence to determine the question of whether there had previously been an appearance, as in the conclusion arrived at upon that point. It would seem sufficient if the defendants availed themselves of the first opportunity of making the motion and filing the petition, and that steps before then taken, necessary to guard their interests in the event of a trial, should not preclude them from so doing.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*H. W. Chase* and *J. A. Wilstach*, for the appellants.

*R. C. Gregory*, for the appellees.

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1860.

JOY v. THE STATE.

JOY  
v.  
THE STATE.

14	139
144	659
14	139
150	897
14	139
168	311
168	313

Indictment of a father for the murder of his infant child. The wife of the defendant, at the time the alleged crime was committed, was afterwards divorced. Her testimony was received touching the transaction as she witnessed it, without reference to any communication from her husband. After the evidence was all heard, and before the jury retired, the Court instructed the jury to disregard her testimony. The trial lasted three days. It was urged that the instruction of the Court could not remove from the mind of the jury the improper impressions made by the statements of the wife; and that at the end of the trial, it would be impossible for the jury to separate those impressions from those derived from the mass of testimony that had been heard. But *held*, upon ample authority, that there was no error. *Quære*, whether the testimony was competent.

Upon cross-examination, a witness was asked whether, about the month of August, at Wabash, she had made certain statements to certain persons. *Held*, that time and place were not fixed with sufficient definiteness to lay the foundation for impeaching testimony.

A verdict in a criminal case may be received on *Sunday*. And if, upon its reception, the jury is discharged without objection, the right to poll the jury is waived.

The sheriff is not the proper officer to interrogate talesmen as to whether they have any conscientious scruples against finding a verdict of guilty, where the punishment would be death. But where the record did not show that any person otherwise competent was rejected by the sheriff because of such scruples, nor that he acted from corrupt motives, nor that any injury resulted to the defendant: *Held*, that there was no error.

Indictment in three counts—1. That defendant held the child in the flames, vapor and steam, issuing from burning brush in the fire-place, until fatal injuries were inflicted. 2. That fatal injuries were inflicted by blows. 3. Alleging both the acts. *Held*, that there was no inconsistency in the counts.

It is settled law in this state, that where a legal indictment has been returned by a competent grand jury to a Court having jurisdiction of the person and the offense, and the defendant has pleaded, and a traverse jury has been duly impaneled and sworn, and all the preliminary requisites of record are ready for the trial,—the prisoner has been once put in jeopardy.

And, in such case, the prosecuting attorney cannot, even with the consent of the Court, enter a *nol. pros.* and indict the defendant again for the same offense.

But when the indictment is so defective in form that if the defendant were found guilty he would be entitled to have any judgment which could be entered thereon against him reversed; or if the judge discover any defect after the trial has commenced which would render a verdict against the prisoner void or voidable; then the judge, upon his own motion, may stop the trial, and what may have transpired will be no bar to future proceedings; and the prosecuting attorney may *nol. pros.* such indictment and procure a new one.

After a plea of not guilty has been entered, and a jury elected and sworn, it is

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entirely irregular, without a formal withdrawal of such plea, and a discharge of the panel, to entertain a motion to quash the indictment.

The right of a prisoner to be discharged because he has been once put in jeopardy, extends only to instances where that peril was really impending over him, "from the verdict that might be returned by the jury upon the matter in reference to which they might lawfully return such verdict."

The Court is not authorized to compel an election where several counts of an indictment are for the same offense, stating it in different forms.

And where such election is ordered, it will be presumed that the indictment charged distinct offenses.

And when such election is made, no jeopardy can be incurred under counts not relied upon; but a *nol. pros.* may be entered, as to such counts, and a new indictment found.

And further, where the defendant is charged in two counts, properly joined, but upon his own motion he procure an order for such election, which operates to withdraw one of the counts from the jury as fully as if it had charged a distinct offense, so that to that count no evidence can be directed if the trial progresses,—he waives any constitutional right that may have apparently attached, as to that count, just as he would have waived it if he had consented to a discharge of the jury, or, after verdict, moved for a new trial or in arrest.

Tuesday,  
May 29.

APPEAL from the *Wabash* Circuit Court.

HANNA, J.—*Joy* was indicted, at the *March* term, 1859, of the *Wabash* Circuit Court, for the murder of his infant child; tried, and convicted of manslaughter, and sentenced to the state prison for eighteen years. He appeals to this Court, and assigns twenty-one errors, which we will dispose of, although we will not notice them in the order in which they are pleaded.

It is urged, in various forms, that error occurred on the trial in the rulings of the Court in reference to evidence. *Maria Joy* was the wife of the defendant at the time of the alleged commission of the crime, but had been divorced from him before the trial. Her testimony was received as to the transaction, as she witnessed it, without reference to any communication that may have passed between her and her husband. Before the jury retired, they were instructed to disregard her testimony; and, in the language of the bill of exceptions, it was "stricken out by the Court." The trial lasted some three days, and it is argued here that the instructions of the Court could not remove from the minds of the jury the improper impres-



sions which might have been made by the statements of Mrs. Joy; that at the end of the time indicated, it would be impossible for the jury to separate the impressions derived from her testimony, from those derived from the great mass of evidence that had been heard; and, therefore, the subsequent action of the Court could not repair the wrong inflicted by the previous error. There is much force in this argument, especially in the case at bar, the record in which discloses the fact that the attention of the defense was directed to an effort to impeach, or rather discredit, Mrs. Joy. After the evidence was all heard, and the argument about to commence, the Court took the action above stated as to her testimony. If this question were not settled by ample authority, we might hesitate long before sustaining the decision below, under these circumstances. We do not decide whether her testimony was competent; that question is not made before us.

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The defendant, upon cross-examination of *Nancy Joy*, his daughter, asked her whether, about the month of *August*, 1858, at *Wabash*, she had made certain named statements to *Peter Joy* and *Anna Joy*. Upon objection made, the Court refused to permit the witness to answer the question. Afterwards, upon objection made, the Court refused to receive the testimony of the impeaching witnesses, upon the point made in the question, for the reason that the foundation for its introduction had not been sufficiently laid. In this, we think, there was no error. The object in requiring the attention of the witness to be called to the time, place, and person, &c., to whom statements were made, is to refresh the memory as to the particular conversation in which the supposed contradiction or statement occurred. The defendant should have been prepared to more definitely fix the time and designate the precise place where the conversation took place as alleged.

On the last *Saturday* night of the regular term of the Court, the case being on trial, the jury, a short time before twelve o'clock, returned a verdict; the counsel for the state and the prisoner were present. There was a delay, until twenty-five minutes past twelve, to await the arrival,

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in the court-house, of the counsel for the defendant. The verdict was then received. The counsel for the defendant stating that he would make no motion then, as *Sunday* was not a judicial day. The jury was thereupon "discharged without objection;" and the Court adjourned until *Monday*. Upon the meeting of the Court on *Monday* morning, the defendant demanded the right to poll the jury, which was refused, because they had been permitted to separate and were not present in Court.

It is now insisted that the Court erred in receiving the verdict on *Sunday*, and in refusing permission to poll the the jury. These points are zealously urged. It has been decided by this Court, in civil cases, that a verdict could be received on *Sunday*. *Rosser v. McColly*, 9 Ind. R. 588. — *Cory v. Silcox*, 5 *id.* 373. We know of no reason why the same rule should not apply in criminal cases. The defendant had the right to poll the jury, at the time of the return of the verdict. This was, in effect, decided in the case above cited from 9 Ind. If he failed to exercise that right, and the jury were permitted to separate without objection, the time to avail himself of that privilege was then passed, and he should not have been permitted, at any future day, although the jury might have been present in the court-house, to then attempt its exercise. The reason for this is obvious. It would be useless to exercise care in guarding the jury from extraneous influences, during the trial of a cause, if the right to poll the jury can be made available after the jury has returned a verdict, been permitted to separate, and ascertain the views of the community upon the subject. Polling the jury is but a mode of obtaining the sense, in open Court, of each individual juror in relation to the correctness of the verdict returned. That view must be governed by the law and the evidence, and must not depend upon the influences that might be brought to bear after a separation.

The sheriff, in summoning talesmen, asked several of the jurymen whether they had any conscientious scruples against finding a verdict of guilty, where the punishment would be the death penalty. This is but putting the ques-

tion in a somewhat similar form to that authorized to be put at the examination of the juror as to his competency. But the sheriff is not the proper officer to put such question, nor decide upon the answers. It is true, he is commanded by the Court to summon competent jurors from the bystanders; but if neither the state nor the defendant sought to ascertain the views of the person presented upon that point, he would, if otherwise competent, be a good juror without reference to his opinion upon that subject. At least, if there were persons accepted upon the panel without examination, possessed of such conscientious scruples, it would, if an error at all, be one in favor of the defendant, and of which he could not complain; and the state could not again prosecute in case of acquittal under such circumstances. But however reprehensible the conduct of the sheriff was upon that subject, there is nothing in the record showing that any person, otherwise competent as a juror, was rejected by him for that reason; nor is it shown that he acted from corrupt motives, or that any injury resulted to the defendant. There was, therefore, no error, in that respect, of which the defendant can avail himself.

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There were three counts in the indictment—

*First.* Averring that defendant held the child in the flames, vapor and steam, arising from burning brush, &c., in the fire-place, until fatal injuries were inflicted.

*Second.* Averring that fatal injuries were inflicted by blows.

*Third.* Alleging both acts.

The defendant moved that the state be compelled to elect upon which count he should be placed upon trial. The motion was overruled.

It is urged that the means set forth by which the fatal result was alleged to have been produced, are “different and inconsistent,” and, therefore, ought not to have been included in the same indictment; or if so included, that the defendant ought not to have been placed upon his trial as to but one of said charges. No authority is referred to by counsel for the appellant.

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It seems to us that it is but a different form of charging the same offense. *The Commonwealth v. Mason*, 2 Ashm. 31.—*The State v. Hogan*, R. M. Charl. 474.—*Hayne v. The People*, 8 Wend. 203.—*The State v. Coleman*, 5 Port. 52. The whole indictment shows that the offense with which the grand jury were charging the defendant, was the murder of his child, *John Joy*. Different means are averred to have been used to accomplish the crime, for the purpose of meeting the proof that might be made. Whart. Cr. Law, § 424.—20 Maine R. 324.—8 C. & P. 727. The evidence given on the trial, if true, showed the use of both means described.

It is urged that the Court erred in refusing a new trial. The evidence is in the record, and the sufficiency of it is involved in this and other reasons assigned.

We have carefully examined the evidence. It presents much conflict in regard to the health of the child previous to the imputed crime, and also in reference to some other matters incident to the main fact; but upon the main facts in the case, namely, that the defendant stripped the clothes from his child; from four to six months old, and taking it by one arm and one leg, held it over a blazing fire, or rather in the blaze, vapor and steam, produced by burning brush, placed upon the hearth to kindle a fire early in the morning, and afterwards struck it several severe blows. There is the uncontradicted evidence of his daughter, aged eighteen years; that is, her testimony is uncontradicted by the evidence of other witnesses upon this point, however far the brutality and fiendish barbarity of the act itself may tend to contradict or weaken the truth of her statements, or the possibility that a father would commit so inhuman an act. But there was, in addition to her evidence, that of one other witness, to the effect that the defendant admitted that he held the child over the fire, but that he did so because it was sick, and for the purpose of curing it, and that he did not burn it. There was also the evidence of medical witnesses to the effect that the description of the sores on the child, and the sloughing after death, showed, in their opinion, that

they had been produced by burning. However long we might have hesitated as jurors to accept as true the evidence of the witness as to the commission of so unnatural a crime, yet the jury, in this case, having weighed the testimony, and passed upon it, we are not prepared to say that their finding is not supported by the evidence.

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The main question in the case remains to be examined. It is presented in different forms, and arises upon the following facts, namely: The defendant was indicted for the same offense at the *August* term, 1858. At the *March* term, 1859, he pleaded not guilty to the indictment, which contained two counts similar in substance to the first two counts of this indictment. A jury was, thereupon, impaneled and sworn. After the jury was so sworn, the Court, without the plea of not guilty having been withdrawn, permitted the defendant to make motions—

*First.* To compel the prosecuting attorney to elect upon which count he would try the defendant. The motion was sustained, and the prosecutor required to elect. He chose to go to trial upon the first count.

*Second.* The defendant moved to quash that count. The Court entertained and sustained the motion. The prosecutor then asked leave to *nol. pros.* the second count, and moved that the prisoner be remanded to jail to await the further action of the grand jury. Permission was granted to enter a *nolle prosequi* as to the second count, which was done, and the defendant remanded to jail, and discharged from that indictment.

The indictment upon which he was afterwards, at the same term, tried and convicted, was then returned by the grand jury. The defendant, upon being arraigned, pleaded the former acquittal upon a similar charge for the same offense. The state replied the facts hereinbefore stated, and that the prosecutor, upon electing to try upon the first count, “dismissed the second count of said indictment.” The defendant demurred to the reply, which demurrer was overruled. The record of the former indictment, and the proceedings thereon, were embodied in the plea, and also given in evidence to the jury on the trial.

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It is insisted that he had been once placed in jeopardy, and could not be again put upon trial, for the same offense.

It appears to be settled by a current of decisions in this country, that where a legal indictment has been returned by a competent grand jury, to a Court having jurisdiction of the person and of the offense, and the defendant has pleaded to such indictment, a traverse jury been duly impaneled and sworn, and all the preliminary prerequisites of record are ready for the trial, the prisoner is then considered to be so far in jeopardy as to preclude any attempt to again place him upon trial for the same offense. Therefore, the prosecuting attorney would not, even with the consent of the Court, be authorized to enter a *nolle prosequi*, and again indict the defendant for the offense. In other words, if the defendant has been thus once legally placed upon his trial, he is entitled to a verdict; or if the jury is improperly discharged, without returning a verdict, the legal effect is an acquittal, except upon the intervention of certain unforeseen occurrences, which it is not necessary to further notice here, as the facts in the case at bar do not bring it within the rules applicable thereto. *The State v. Davis*, 4 Blackf. 345.—*The State v. Kreps*, 8 Ala. R. 951.—*The State v. Thornton*, 13 Ired. 256.—*The State v. McKee*, 1 Baily, 651.—*The Commonwealth v. Wheeler*, 2 Mass. R. 172.—*Clarke v. The State*, 23 Mo. R. 261.—1 Bish. on Cr. Law, 659, 661.—*Weinzorpflin v. The State*, 7 Blackf. 191.—*Wright v. The State*, 5 Ind. R. 292. It is also true, that as respectable an array of authorities and adjudications might be cited to the effect that the jeopardy does not fully attach until the return of the verdict. But this Court has heretofore accorded in its decisions with the proposition first above laid down.

But it has been often decided that all the necessary preliminary things of record do not exist, so as to place the prisoner in jeopardy, when the indictment is so defective in form, that, supposing the defendant found guilty by the jury, he would be entitled to have any judgment which could be thereon entered up against him reversed. Therefore, whenever, after a trial has commenced, the

judge discovers any imperfection which will render a verdict against the prisoner void or voidable, upon his motion, he may stop the trial, and what has transpired will be no bar to future proceedings; consequently, a prosecuting attorney, under our practice, which requires the consent of the judge to the act, might enter a *nolle prosequi* to such an indictment, and procure a new one. 2 Hale's P. C. 248.—*The People v. Barrett*, 1 Johns. 66.—*The Commonwealth v. Loud*, 3 Met. 328.—*Same v. Keith*, 8 *id.* 531.—*The State v. Williams*, 5 Md. R. 82.—*Pritchett v. The State*, 2 Sneed, 285.—*The Commonwealth v. Chichester*, 1 Va. Cas., 312.—*Cochrane v. The State*, 6 Md. R. 400, 406.—*Walton v. The State*, 3 Sneed, 687.

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A late writer upon criminal law, and one who enters fully into the discussion of the question now under consideration, uses the following language:

"The prohibition of a second jeopardy implies, in the first place, that there has been such a jeopardy already as the machinery of government, in its ordinary workings, is able to bring upon a person committing crime. \* \* \* The bringing of the defendant into Court by arrest, is what we have termed the obtaining, by the governmental power, of the control of his person. The finding of the indictment, the impanneling of the jury, and the completion of the case in all other respects for trial, are the laying hold, by the governmental power, of the machinery. But if the machinery is in any respect imperfect, whether the imperfection is apparent or not—imperfect to the extent, that what it does is liable to be undone on application of the defendant, after his conviction—then the question is the same as if the power had not put its hand at all on the machinery." 1 Bish. on Cr. Law, 671.

Again, it has been often held that a prisoner may, by his own consent, waive many things falling under the constitutional right now being considered; among others, where a verdict has been rendered on an indictment good or bad, if the defendant should move in arrest of judgment, he will be presumed to waive any objection to being put a second time in jeopardy, and may ordinarily be tried



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When the indictment is good, and the Court, laboring under the belief that it is not good, shall, on the defendant's application, arrest judgment on a verdict of conviction, the defendant's jeopardy has ceased, at his own request, and for his own benefit, and he may be proceeded against anew, where the prosecutor is not authorized to obtain a reversal of the judgment of arrest so as to again proceed on the former indictment. *Id.* 674.—*The State v. Norvell*, 2 Yerg. 24.—*The People v. Casborus*, 13 Johns. 351.—*Gerard v. The People*, 3 Scam. 362.

Apply these principles to the facts existing in the case at bar, and it is apparent at once that, as to the count of the first indictment which was, on the defendant's motion, quashed, he could not successfully rely upon the proceedings thereon as a bar to a second prosecution. Certainly the sustaining the motion to quash, whether rightfully or not, could not place him in a worse condition than if he had been tried on the same, and, after a verdict of guilty thereon, the judgment had been arrested on his motion. *Pritchett v. The State*, 2 Sneed, 290.

As to the effect of the proceedings on the second count in the first indictment, which is valid, still more difficulty is presented, in consequence of the strange and unusual course pursued in the proceedings, in attempting to place the defendant upon trial on that first indictment.

After the plea of not guilty had been entered, the jury elected and sworn, it was entirely irregular, without a formal withdrawal of such plea, and a setting aside of the impanneling, &c., of the jury, to entertain the motion to quash the indictment. If the course indicated, and which



appears to us, in view of the authorities above referred to, the proper one, had been pursued, the motion of the defendant to set aside the jury and to withdraw his plea, would have made a record showing, affirmatively, that he had waived any rights which were, by the constitution, secured to him from such acts having taken place. But as the Court permitted this irregular proceeding, the question is, what was the effect?

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We conceive it to be a correct proposition, that the most liberal view that can be taken in favor of the constitutional right of a prisoner to be discharged because he has been once placed in jeopardy, only extends to instances where that peril was really impending over him from the verdict that might be returned by the jury, upon the matter in reference to which they might lawfully return such verdict.

The Court, trying the case, is not authorized to compel an election, in an instance where the several counts of the indictment are for the same offense, and merely state the charge in different forms. We should presume that the ruling of the Court in compelling the election, was based upon this legal principle, and was correct. In other words, that there were separate charges in the indictment, of distinct offenses.

It is true, that the election was not made until after the jury were sworn; and, apparently, they were sworn to try all the charges in the indictment. But in point of fact, by the act of the defendant in making the motion to compel the election, only one of the offenses as charged was reserved for the consideration of the jury. If the trial had progressed to a verdict—that is, to the return of a verdict—but the one charge could have been investigated by that jury. The defendant would have been in no peril in regard to any verdict then to be returned as to the offense charged in the second count, for none could be returned in reference thereto. Certainly no peril existed from the time election had taken place, as to the second count. That election was the consequence of his own motion, and was one of the “preliminary things of record” which

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was legitimately interposed by him to rid himself of the jeopardy which would otherwise attach as to a part of the charges embodied in the indictment. By failing to make the motion, he could have taken the risk of the jeopardy resulting from a trial upon the whole indictment. Before the prosecuting attorney had stated the case to the jury, which, under our practice, is, in effect, giving the defendant and the case in charge to the jury (2 R. S. p. 374, § 103), the defendant made a motion which was equivalent to saying, "I protest against being given in charge to this jury for trial upon all the offenses embodied in this indictment. I insist upon being tried on one charge only, and that all the other charges in the indictment be withdrawn from the consideration of the jury."

It is true, that, as the election rested with the state as to which charge the prisoner should be tried upon, it was, until that election was made, uncertain as to which he would be placed in jeopardy; but until that election was made, all the "preliminary things of record," which might rightfully intervene, were not ready for the trial; and the jeopardy, therefore, really never attached, in the proper sense of the constitution, to the defendant, in respect to any of the charges in the indictment but the one on which, in consequence of his own motion, he was ultimately placed upon trial.

The Supreme and some of the Circuit Courts of the *United States*, as well as the highest judicial tribunals of several of the states, have held that the jeopardy meant by these constitutional provisions, has not attached, in a legal sense, until a verdict has been returned. Most surely, whilst we are giving to a similar provision of a constitution a construction so much more liberal, in favor of a person charged with crime, we ought not, unless the subject was free from doubt, in view of these high authorities, to draw such finespun theories in favor of the liberty of the citizen, and his constitutional rights, as to decide that, legally, a prisoner had been placed in jeopardy, when, in point of fact, he had not been in a position where evidence, which might lawfully have gone to the jury on the

former trial, could have imperiled a conviction for the same offense now being investigated.

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To illustrate: Suppose, in a given case, two offenses had been committed—one on the first of *November*, an assault and battery upon *A. B.*, with intent to murder by *C. D.* Afterwards, on the first of *February* following, *C. D.* should actually murder *A. B.* And suppose, further, that *C. D.* should be charged with both of the offenses in the same indictment, but in different counts, correctly as to dates, but charging in each that death ensued. On the face of the indictment it would appear to be good. And suppose, further, that, after the jury should be impaneled and sworn, the prosecutor, before swearing any witnesses, or stating his case to the jury, upon the fact being shown to the Court that he was attempting to try the defendant for both offenses, should be compelled by the Court, on the motion of the defendant, to elect upon which charge he would try, and the prosecutor, under the belief, whether properly or improperly entertained it is not necessary to decide, that a conviction might be had for an assault and battery with an intent to murder under a count for murder, by virtue of the 2 R. S. p. 370, § 72, should thereupon elect to try upon the count charging the offense committed in *November*, and should enter a *nol. pros.* as to the other count; and upon the trial of the defendant for the offense of *November*, he should be acquitted for any reason, is it true that the acquittal thus obtained of the offense charged to have been perpetrated in *November*, is a bar, under these circumstances, to a further prosecution for the more heinous offense of *February*, in reference to which no evidence was heard, no verdict rendered—in a word, an offense which was not for a moment considered by the jury? We cannot see that the jeopardy ever attached, as to that offense, so as to bar another prosecution.

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The impanneling and swearing the jury would be subject to the legal right of the defendant to insist that the state should elect upon which charge a trial should be then had. Upon the happening of this event, a legal necessity would then exist for the withdrawal of a part of

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the charges from the consideration of the jury—a stopping of the trial as to such part—and consequently no jeopardy would have, as to that part, attached, although it had, for a time, apparently so attached.

Thus far we have been considering this question under the assumption that two distinct offenses were charged in the first indictment, and the ruling of the Court in compelling an election, proper. In point of fact, such was not the case. In that indictment the same offense was charged in different forms, and the second count was, upon its face, a good count.

We have already seen that if a defendant moves in arrest, or to vacate a judgment already rendered, he will be presumed to waive any objection to being put a second time in jeopardy; and if he succeeds in causing judgment to be arrested on a verdict rendered on a good indictment, the Court supposing it to be bad, he may be again placed on trial. The reason of this is that the proceedings were had at his instance, which resulted in setting aside the verdict, &c. It was for his benefit, and he is presumed to waive any future peril he may incur, in view of the advantage he derives by getting rid of the present pressing jeopardy. So in the case at bar, the defendant was charged in two counts with having produced the death of a human being—first, by fire; second, by blows. The counts were properly joined; but by his own motion, and therefore certainly with his consent, he procured an order of the Court which operated to withdraw the second count from the consideration of the jury as fully as if it had charged a separate offense. To that count no evidence could have been directed, if the trial had progressed. By that act, it appears to us, for these reasons, and those heretofore advanced, he consented to waive any constitutional rights which might have apparently attached, just as he would have waived those rights if he had consented to the discharge of the jury, or after verdict moved for a new trial or in arrest. *Elijah v. The State*, 1 Humph. 102.—*Williams v. The Commonwealth*, 2 Grat. 567.—*Dye v. The Commonwealth*, 7 id. 662.—*The State v. McKee*, 1 Baily, 651.—

*Spencer v. The State*, 15 Geo. R. 562.—7 Blackf. 186.—7 May Term, 1860.  
N. Hamp. R. 287.—6 Alb. 676.—2 Leigh, 727.—17 Mass. R. 515.—1 McLean, 429.—3 *id.* 573.—5 *id.* 286.—8 Wend. 549, and authorities heretofore cited. WILKINS  
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*Per Curiam*.—The judgment is affirmed.

*J. U. Pettit, C. Cowgill, and J. B. Conner*, for the appellant.

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Section 14 of article 4 of the constitution literally extends to criminal prosecutions only; but in its spirit and intent, it protects a person from a compulsory disclosure in a civil suit of facts which might subject him to a criminal prosecution.

But the statute providing that a person charged in a civil suit with taking illegal interest may be required to answer, and that his answer shall not be used against him in a criminal prosecution for usury, is not unconstitutional.

The section in question does not extend to mere penalties and forfeitures.

APPEAL from the *Posey* Court of Common Pleas.

*Tuesday,*  
*May 29.*

WORDEN, J.—*Malone* brought suit against *Wilkins* and others on a promissory note.

The defendants pleaded usury. Replication in denial, and trial by the Court; finding for the plaintiff for the full amount appearing to be due on the note, and judgment on the finding, a new trial being refused.

On the trial, the defendants offered to examine *Malone*, the plaintiff, as a witness in the cause, to prove the usury set up in the answer; but the plaintiff objected on the ground that such examination would criminate himself, and the objection was sustained by the Court, and the defendants were not permitted to examine the plaintiff as to the alleged usury. This ruling presents the only question involved in the case.

The 51st section of the act defining and punishing misdemeanors (2 R. S. p. 440), makes it a penal offense to

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“receive or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law.”

The 14th section of the first article of the constitution of the state provides, that “No person, in any criminal prosecution, shall be compelled to testify against himself.”

Literally, this provision extends to criminal prosecutions only, and not to civil actions; but we think its spirit and intent go much farther, and protect a person from a compulsory disclosure, in a civil suit, of facts tending to criminate the party, wherever his answer could be given in evidence against him in a subsequent criminal prosecution. As was said of a like provision, by the Supreme Court of *Georgia*, in the case of *Higdon v. Heard*, 14 Geo. R. 255, “by it all persons are protected from furnishing evidence against themselves which may tend to subject them to a criminal prosecution.”

Were there no other statutory provisions bearing on the subject, the ruling below would have been, without doubt, correct.

In 1 R. S. p. 345, are found the following sections:

“SEC. 6. Any person charged with taking illegal interest, may be required to answer on oath in any civil proceeding.”

“SEC. 8. Any officer or agent of a corporation, whether interested or not, may be summoned as a witness, in an action for usury against such person or corporation, and required to disclose all the facts of the case; but the testimony of such witness, or the answer of a party as required in section six, shall not be used against such witness or party in any criminal prosecution for usury.”

The counsel for the appellee insists that although the testimony thus provided for cannot be given in evidence against the party in a criminal prosecution for usury, yet that the constitution protects him from being thus compelled to testify. He argues as follows:

“There is no provision in the code exonerating the party or witness from criminal prosecution after examination. He is still liable to be accused and convicted. This being

the case, the protection provided for the witness or party in § 8 amounts to no protection at all. True, the 'testimony of such witness, or the answer of a party,' shall not be used against him in a criminal prosecution for usury; but to what does this amount? You shall not be permitted to prove what he testified, but you can make him give a detailed statement of all the facts and circumstances under oath, and then, by the light thus thrown upon the case, you can bring in other witnesses and convict him. Would not such a course tend to criminate the party? If this evasion of the spirit of our constitution can be applied to cases of usury, it can, with the same propriety, be applied to every other crime; and where usury has been taken under pretended sales, the party examined would be compelled to furnish the key that would unlock all doubts, and lead him to his own conviction."

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The statute having provided that a party charged with taking illegal interest may be required to answer, and that his answer shall not be used against him in a criminal prosecution for usury, we think that his constitutional rights are substantially protected by the exclusion of his answer, in a criminal prosecution for usury; and that he may be required to answer in a civil proceeding.

But two cases that seem to bear directly upon this point have come under our notice, one of which is *Higdon v. Heard*, *supra*, and the other is *The State v. Quarles*, 8 Eng. (Ark.) 307.

In *Higdon v. Heard*, it was held that an act requiring a defendant to answer as to gaming, on a bill in chancery for discovery, was valid, and not in conflict with the constitution, as the constitution itself would furnish the party a protection by excluding the answers thus elicited, in any subsequent criminal case. According to this case, had our law stopped with requiring the party to answer as to the usury, and made no provision excluding the answers given from being used in a criminal case, it would still have been valid, and the party would have been bound to answer in a civil proceeding; the constitution itself, without any statute, furnishing its own protection, and exclud-



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ing the evidence thus elicited from being given on the trial of a criminal case.

In the case of *The State v. Quarles*, it was held that "where two persons are concerned in the commission of a crime (as in gaming), one of them may be compelled, under § 72, &c., to give evidence on the trial of an indictment against the other; because, by the provisions of that statute, 'the testimony of such witness shall, in no instance, be used against him in any criminal prosecution for the same offense,' and thus he is protected from self-accusation, and his common-law and constitutional privilege secured to him."

These cases seem to settle the principle involved in the case at bar. The constitutional provision in question is thoroughly interwoven with the history and principles of the common law. It exempts no one from the consequences of a crime which he may have committed, but only from the necessity of himself producing the evidence to establish it. "It is founded upon the general sense of enlightened men, that compulsory self-accusation of crime is not only at war with the true charities of religion, but has been proven to be impolitic by the truths of history, and the experience of common life." When it is provided that the answers elicited from a party in a civil proceeding shall not be used against him in a criminal prosecution for the usury, it seems to us that his constitutional privilege is fully secured to him. True, he may disclose facts that were before unknown to any officer whose duty it may be to prosecute offenses, or to any one but himself. He may disclose circumstances that may lead to a criminal prosecution. But these facts and circumstances cannot be proven by the answers thus compelled. They must be proven entirely by other means, and the party cannot be said, in any just sense, "to be compelled to testify against himself" in the criminal prosecution, because the evidence which he furnishes in the civil proceeding can, in no manner, be given against him in the criminal. This view is not without close analogy in the principles of the common law. Thus, where confessions have been obtained



from a party under circumstances that would render them inadmissible as evidence in a criminal prosecution against him, and the confessions bring to light facts until then unknown, the facts may be proven by other testimony, although the confessions are wholly inadmissible. Archb. Crim. Pr. (7th ed.) 424.—*The Commonwealth v. Knapp*, 9 Pick. 496.

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The appellee takes another position as follows:

“Aside from the view I have presented, there is another reason why the ruling of the Court below should be sustained.

“Section 5, 1 R. S. p. 344, provides: ‘If interest be paid or reserved at a higher rate than by law allowed, the payer, or his personal representative, may recover such interest, with 10 per cent. damages thereon, by suit, if commenced within one year after payment thereof.’

“Under this section, *Malone* might have been liable for the above penalty, and § 8 would not shield him in a civil suit for the same, as it only applies to criminal prosecutions.”

On the supposition that the penalty or forfeiture provided for, is such, that at common law a party would be protected from testifying in relation to it, still it is within the control of the legislature, and they having provided that he should answer, we are of opinion that the act is valid, and that an answer can be legally required. The constitutional provision does not, as we think, extend to mere penalties and forfeitures, but only to “criminal prosecutions.”

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. P. Edson*, for the appellants.

*A. P. Hovey*, for the appellee.

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A. contracted with B. for the purchase of all the wheat he, B., might raise on his farm for the current season, at a certain price per bushel. *Held*, that there was no implied warranty, on B.'s part, as to the quality or value of the wheat to be delivered.

Tuesday,  
May 29.

APPEAL from the *Henry* Circuit Court.

WORDEN, J.—*Davis* brought suit against *Murphy* upon a contract, which is set out as follows, viz.:

"I, *Joel Murphy*, have this day bought of *Nathan Davis*, all the wheat he raises this season on his home farm, except enough for his bread and seed-wheat, for which I agree to pay one dollar, in good *State Bank of Indiana* or *Ohio State Bank* paper money, at the time of delivery, at *Millville, Henry* county, *Indiana*, which is to be between the first day of *August* and 10th day of *September* next. I agree to furnish a sufficient number of sacks at *Millville* when requested, by mail, and one week's notice before the wheat is to be threshed. This 23d day of *June*, 1857.

[Signed] "Joel L. Murphy."

The complaint avers that the words "per bushel" were, by mistake of the draftsman, omitted and left out after the words "one dollar," contrary to the agreement and purpose of the parties. It is averred that the plaintiff raised on his home farm that season three hundred and twenty bushels of wheat, over the amount required by him for bread and seed; and that after giving notice, &c., he did, on the 8th of *September*, 1857, haul to said *Millville*, and had ready to deliver to the defendant, the wheat, and then and there requested him to receive the same and pay him therefor according to the agreement, but the defendant refused and still refuses so to do; and that the plaintiff still has the wheat ready to deliver to the defendant if he will receive the same. There are other averments in the complaint not necessary to be here noticed.

The defendant answered, amongst other things, as follows: "That at the time of making said agreement, to-wit, on, &c., the wheat spoken of in said agreement was

unripe and not matured, but green and growing on the farm of said plaintiff; that before said wheat ripened or matured, it was stricken with the rust, and otherwise blasted and injured to such an extent that the same never filled or properly matured, but was harvested and threshed, and hauled to said *Millville* by said plaintiff, in a shriveled, blasted, and unmerchantable condition; that the defendant had no knowledge of the condition of said wheat until after the same was so hauled to said *Millville* by the plaintiff; that he refused to receive and pay for said wheat, because of its unmerchantable and unsaleable condition as aforesaid."

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To this paragraph of the answer the plaintiff demurred, but the demurrer was overruled, and he excepted. There were other pleadings in the cause; but the above present the question upon which the case turns. Judgment was entered for the defendant.

In order to test the correctness of the ruling on the demurrer, it is necessary to ascertain what is the true interpretation and effect of the contract set out. It is contended, on the one hand, that there was an implied warranty that the wheat, when delivered, should be merchantable; while, on the other, it is insisted that no such implication attaches, and that *Murphy* was bound to receive and pay for the wheat, at the stipulated price, although it might be shriveled, blasted, and unmerchantable.

By the terms of the contract, *Murphy* bought of *Davis*, at the stipulated price, "all the wheat he (*Davis*) raises this season on his home farm, except," &c. By this contract, *Davis* was not bound to deliver, nor was *Murphy* bound to receive, any other wheat than that which *Davis* should raise on his home farm that season.

"When a sale is of particular classes and descriptions of goods generally, to be selected by the vendor, such as a sale of so many measures of corn, wine, oil, or fruit, and not of any specific ascertained parcel of goods, the vendor will fulfill his contract by furnishing any goods fairly answering the description given by him. When, on the other hand, the precise article intended to be bought and sold

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was ascertained and identified at the time of the making of the bargain, the vendor must deliver the identified thing so fixed upon and ascertained, and cannot fulfill his contract by tendering and delivering anything else of a corresponding nature." Add. on Cont., p. 228.

The contract in question being for certain specific wheat, viz., that which *Davis* raised on his home farm that season, his obligation required a delivery of that particular wheat, although it might be more valuable than ordinary wheat that would come up to the standard of a merchantable quality. On the other hand, a delivery of the wheat contracted for would be a discharge of his contract; and he would be entitled to the stipulated price, although the wheat fell short of the standard, unless there was an implied warranty that the wheat should come up to that standard.

The following observations of an eminent jurist on the subject of implied warranties, are worthy of quotation: "If there be no express warranty, the common law, in general, implies none. Its rule is, unquestionably, both in *England* and in this country, *caveat emptor*—let the purchaser take care of his own interests. This rule is apparently severe, and it sometimes works wrong and hardship; and it is not surprising that it has been commented upon in terms of strong reproach, not only by the community, but by members of the legal profession; and these reproaches have, in some instances, been echoed from tribunals which acknowledge the binding force of the rule. But the assailants of this rule have not always seen clearly how much of the mischief apparently springing from it arises rather from the inherent difficulty of the case. As a general rule, we must have this or its opposite; and we apprehend that the opposite rule—that every sale implies a warranty of quality—would cause an immense amount of litigation and injustice. It is always in the power of a purchaser to demand a warranty; and if he does not get one, he knows that he buys without warranty, and should conduct himself accordingly; for it is always his duty to take a proper care of his own interests, and to use all that

precaution or investigation which such case requires; and he must not ask the law to indemnify him against the consequences of his own neglect of duty." 1 Pars. Cont. 460.

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To this general rule that the law implies no warranty of the quality of goods, there are numerous exceptions; but we are of opinion that the contract in question does not fall within any of them.

It may be conceded that on principles that are universally understood, where there is a contract to deliver a quantity of a given article, for example, a hundred bushels of wheat, a merchantable or marketable quality of the article is always intended by the parties. *Howard v. Hoey*, 23 Wend. 350. But the case at bar does not come within that principle. Such a contract could be discharged by the delivery of any wheat of a merchantable quality, it not being for any particular and specified wheat. The Court in that case note the natural and obvious distinction between such a contract and a contract for the future delivery of a determinate and specified article. They say: "The common law will be found to have acted on the former rule (*caveat venditor*) in respect to executory sales, or more properly speaking, agreements to make sales of indeterminate things; though I do not find any case expressly holding the distinction. In short, there is always a warranty or promise implied, that the indeterminate thing to be delivered, should at least not have any remarkable defect; though the rule of the common law is clearly otherwise in respect to what is properly denominated a rule." A contract for the future delivery of a specific thing, as in the case at bar, undoubtedly stands upon the same ground, so far as warranty of quality is concerned, as executed contracts for the sale of property.

Nor does the case fall within the exception that where goods are ordered of a manufacturer for a particular purpose, there is an implied warranty that they shall be fit for the purpose designed. Even were a wheat-grower to be considered, in respect to wheat, a manufacturer, still it does not appear that the wheat purchased was intended

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for any particular purpose; but were it so, the purchaser having contracted for the particular wheat specified, took upon himself the risk of its answering the intended purpose. Pars. on Cont. 470.—*Chanter v. Hopkins*, 4 M. and W. 399.

The case does not come within another exception to the general rule—that where an examination of the article sold is, from its nature and situation at the time of the sale, impracticable. The defendant had an opportunity to examine the situation of the growing wheat, and had the opportunity of judging as to its prospects, equally with the plaintiff. *Vide Humphreys v. Comline*, 8 Blackf. 516.

The case of *Sutton v. Temple*, 12 M. and W. 52, is strongly in point here. A. hired, in writing, the eatage or pasturage of twenty-four acres of land from B. for seven months, at a rent of £40, and stocked the land with beasts, several of which died a few days afterwards from the effect of a poisonous substance which had accidentally spread over the land without the knowledge of B. *Held*, that A. could not abandon the land for breach of an implied contract in B., but continued liable for the whole rent.

“The law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, and who does not affirm that the article is fit for any particular purpose, any warranty or undertaking beyond the ordinary promise that he makes no false representations calculated to deceive the purchaser, and practices no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods.” Add. on Cont. 230.

The construction sought to be put upon the contract in question, by the defendant, would lead to what would seem to us to be an absurdity. If the contract, by the construction of its terms, or by way of implication, be held to mean that the wheat shall be of a merchantable quality, or otherwise that the purchaser is not required to take and pay for it, this obligation must be mutual, and

the seller would not be bound to deliver it unless it were of that quality, for he would not be bound to deliver that which the purchaser would not be bound to receive. Now supposing that wheat, at the time this was to have been delivered, was worth, say a dollar and a half per bushel, and the plaintiff could sell this particular wheat to some one else, it not being merchantable, for a dollar and a quarter per bushel, and did so, it is very clear to our minds that in a suit by the defendant against him for a failure to deliver the wheat according to the contract, it would be no defense for him to say that the wheat was unmerchantable, and therefore he was under no obligation to deliver it according to the contract, but had a right to take advantage of the rise in the market.

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We are of opinion that by the settled rules of the law, the defendant, having bought, in the language of the contract, "all the wheat he (*Davis*) raises this season on his home farm," &c., he took upon himself not only the risk as to the value of wheat generally, but also as to the value and quality of the particular wheat thus purchased.

It follows that the answer was no bar to the action, and that the demurrer to it was improperly overruled.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. Brown* and *W. Grose*, for the appellant.

*J. H. Mellet* and *E. B. Martindale*, for the appellee.

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SMALL v. REEVES.

14	163
136	614
14	163
167	272
167	274

Upon an executory contract to convey land by deed with covenants of warranty, the seller must have, and offer to convey, a perfect title, at the time the last installment of purchase-money becomes due and the deed is to be executed, to enable him to recover unpaid purchase-money.

Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he

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retains the deed, and possession, and has been subjected to no inconvenience or expense on account of the defect of title.

Where incumbrances constitute the defect of title, the purchaser, where they are embraced by the covenants in his deed, may pay them off, and set up the amount in bar of recovery of an equal amount of purchase-money. And, perhaps, he may temporarily enjoin, under some circumstances, the collection of the purchase-money.

In all cases where the purchaser is evicted upon a paramount title, within his covenants, he may set up the damage in bar of recovery of unpaid purchase-money; or, if the purchase-money has been all paid, he may sue, and recover for full damages, upon his covenants. It is otherwise where the deed is without covenants.

Any adverse possession, but especially such as is alleged in this case, at the time of the conveyance, it seems, is an eviction, and renders the conveyance made utterly void.

Wednesday,  
May 30.

APPEAL from the *Clark* Circuit Court.

PERKINS, J.—Suit for a part of the consideration of the sale of land. A deed for the land had been executed. The deed contained the covenants of general warranty, and for quiet and peaceable possession.

The answer set up a breach of the covenants as to ten acres of the land, which, it was averred, were, at the time of the execution of the deed above named, in the adverse possession of one *Patterson*, who held them by a fee simple, indefeasible title, and still held the possession in virtue of such title, and that said ten acres were worth 1,200 dollars, being more than the balance of the purchase-money sued for.

A demurrer to this answer was sustained.

The following propositions touching the sale and conveyance of land in this state would seem to be settled by our own decisions.

1. Upon an executory contract to convey land by deed with covenants of warranty, the seller must have, and offer to convey, a perfect title, at the time the last installment of purchase-money becomes due and the deed is to be executed, to enable him to recover unpaid purchase-money. Ind. Dig., p. 792.

2. Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover



more than nominal damages on his covenants, while he retains the deed, and possession, and has been subjected to no inconvenience or expense on account of the defect of title.

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This is, in many of the cases, because the purchaser's possession, being under color of title, may continue undisturbed for twenty years, and thus become perfect, and he be uninjured. And he may rely on the covenants in his deed for redress, if injury occurs. *Hannah v. Henderson*, 4 Ind. R. 174.—*Reasoner v. Edmundson*, 5 id. 393. See *Osborn v. Dodd*, 8 Blackf. 467.

3. Where incumbrances constitute the defect of title, the purchaser, where they are embraced by the covenants in his deed, may pay them off, and set up the amount in bar of recovery of an equal amount of purchase-money. *Holman v. Creagmiles*, at this term (1). And, perhaps, he may temporarily enjoin, under some circumstances, the collection of the purchase-money. *Oldfield v. Stevenson*, 1 Ind. R. 153, and cases cited.

4. In all cases where the purchaser is evicted upon a paramount title, within his covenants, he may set up the damage in bar of recovery of unpaid purchase-money; or if the purchase-money has been all paid, he may sue, and recover full damages, upon his covenants. Ind. Dig. 357.—*Reese v. McQuilkin*, 7 Ind. R. 450.

It is otherwise where the deed is without covenants. *Major v. Brush*, 7 Ind. R. 232.—*Hardesty v. Smith*, 3 id. 39.

5. Any adverse possession, but especially such as is alleged in this case, at the time of the conveyance, it seems, is an eviction, and renders the conveyance made utterly void. Ind. Dig. 104. See Rawle on Covenants for Title, 75, 268; *Bottorf v. Smith*, 7 Ind. R. 673.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*R. Crawford*, for the appellant.

*W. T. Otto*, for the appellee.

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LAYMAN v. GRAYBILL.

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The proceedings of Courts are to be considered *in fieri*, until the close of the term at which they are entered.

Thus where there was no answer as to a part of the claim in suit, and an interlocutory judgment was taken as to that part, and afterwards, upon the return of a verdict, the defendant moved to set aside the interlocutory judgment, and substitute the amount found by the jury as the amount for which judgment should be rendered, supporting his motion by the affidavit of the jurors that they considered the facts of the case and agreed upon their verdict as if the whole amount of the plaintiff's claim was before them; that they did not intend that the sum included in their verdict should be added to the amount of the interlocutory judgment: *Held*, that the Court might, upon this affidavit, rectify the irregularity, and sustain the motion.

Wednesday,  
May 30.

APPEAL from the *Montgomery* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, sued *Graybill* upon a promissory note for the payment of 1,165 dollars. The note bears date *January 2, 1856*, was payable to *W. H. Layman & Co.*, and was by them assigned to the plaintiff.

Defendant, in his answer, sets up these facts: On the 8th of *June, 1856*, he became a partner of *Layman & Co.*, the payees of the note, in the business of selling groceries. The partnership agreement was in writing. Pursuant to that agreement, they, the defendant and said *Layman & Co.*, established a grocery store at *Ladoga*, in *Montgomery* county, which was continued up to *January 2, 1857*, when *W. H. Layman*, one of the partners, proposed selling out to the defendant the interest of *Layman & Co.* in the establishment. At the time this proposal was made, he represented to defendant that *Layman & Co.* had furnished and put into said grocery store, moneys and goods to the amount of 1,965 dollars, in proof of which he then referred defendant to the ledger belonging to the establishment, and especially to an account which appears as an entry on page 2 of that ledger. Defendant, relying on said representations, agreed to purchase the interest of *Layman & Co.* in the grocery store, upon the following terms, viz.: He was to pay them for all the moneys and goods which

they had put into the establishment; also 200 dollars as their share of the profits. And thereupon the defendant and *W. H. Layman* struck a balance sheet, as between the partners in said store, upon the basis of the entry on page 2 of said ledger, and the above terms of sale. And upon such balance sheet being struck, it showed a balance in favor of *Layman & Co.* of 1,165 dollars, for which the defendant, relying upon said representations, as corroborated by the entry in the ledger, executed the note in suit. It is averred that defendant, after the execution of the note, discovered that the above representations of *W. H. Layman*, and also the entry and account in the ledger, on the second page thereof, were false and fraudulent in this, that said entry and account shows an item designated capital stock, amounting to 760 dollars, 65 cents, which purports to be, and is, entered as so much capital stock furnished said grocery establishment by *Layman & Co.*, when, in point of fact, they never did furnish the same, or any part thereof, either in cash or merchandize; and hence said item of 760 dollars, 65 cents, ought not to have been counted in the balance struck between the parties, under the contract of sale above recited; but the same was so counted, and having been fraudulently included in said note, ought, therefore, to be deducted from it. As to the balance of the note, viz., 454 dollars, 75 cents, there was no answer.

Plaintiff replied by a general traverse. Before entering upon the trial, the plaintiff, as to the balance of said note not controverted by the answer, moved for an interlocutory judgment, which motion the Court sustained. The cause was then submitted to a jury, who found for the plaintiff 487 dollars, 80 cents.

The record says that defendant, upon the return of the verdict, moved to set aside the order for the interlocutory judgment, and substitute the amount found by the jury as the amount for which judgment in the suit be rendered. And in support of his motion, he produced an affidavit subscribed and sworn to by the jurors who returned the verdict, in which they deposed, substantially, that they considered the facts in the case and agreed on their ver-

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dict, as if the whole amount of plaintiff's claim, 1,165 dollars, was before them; that they intended to deduct from the whole note 700 dollars, and give the plaintiff a verdict for the residue, 487 dollars, 80 cents; but they did not intend that the sum included in their verdict should be in addition to the amount of the interlocutory judgment.

The Court, having heard the motion, sustained it, upon the ground that the interlocutory judgment was merged in the verdict of the jury.

The plaintiff thereupon moved for a new trial; but his motion was overruled, and judgment was rendered on the verdict.

The first alleged error relates to the action of the Court in setting aside the interlocutory judgment. As a general rule, the proceedings of Courts are to be considered *in fieri*, until the close of the term at which they were entered. 9 Ind. R. 490. Hence, it may be assumed that the Court—proper application having been made during such term—may set aside or modify any of its proceedings, in order to promote the due administration of justice. And, in this instance, the ruling must be sustained, unless it is found that the application to set aside was unsupported by sufficient cause. It was plainly irregular for the jury to find a verdict upon the whole case made by the complaint, because the amount of the interlocutory judgment was not in issue by the pleadings. The item of 760 dollars, alone, was before them for consideration, and the correction of such irregularity, being within the power of the Court, the only legitimate mode of effecting that purpose seems to have been adopted. The interlocutory judgment having been set aside, the final recovery against the defendant stood as it would have stood had the jury deducted the judgment from the amount of their verdict. That they did not do so is evident from the fact that the several amounts of the judgment and verdict, when added together, amount, in the aggregate, to more than the note in suit and interest. But further, the jurors themselves all testify that they did not intend that the sum included in their verdict should be in addition to the amount of the

interlocutory judgment. The testimony of the jurors thus given on the application to set aside the judgment, was legitimate; because it tended to sustain the verdict. 2 Blackf. 114.—6 *id.* 453. Indeed, the evidence produced on the application was conclusive, and, in our judgment, fully authorized the ruling of the Court.

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But the appellant assigns another error, viz., that the verdict was not sustained by the evidence. We think otherwise. The evidence given on the trial is, it is true, to some extent conflicting; but the weight of it fully sustains the finding.

We are of opinion that the record before us contains no error available in this Court; and that the judgment of the Court below is in accordance with the substantial rights of the parties.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. E. McDonald* and *S. C. Willson*, for the appellant.

*L. Wallace*, for the appellee.

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ANDREWS v. THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

A commissioner in a foreign state, appointed under the statute of 1852, is authorized to administer oaths, and certify affidavits.

Where a notary public in a foreign state has, by the state law, authority to take and certify affidavits, § 281, 2 R. S. p. 91, makes such certificate presumptive evidence in this state.

A judgment will not be reversed for a refusal to strike out immaterial matter. Section 284, 2 R. S. p. 93, lays down a general rule as to what shall be deemed competent evidence of the acts and proceedings of corporations, and what the force thereof, without reference to the place where the evidence may have been taken.

Where the charter of a corporation limited the amount that should be called for upon a subscription of stock to 15 per cent. per annum, and 10 per cent. had been paid, a call was *held* to be sufficiently explicit without specifying a place of payment or the per cent. to be paid—time and place being fixed by the notice.

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Publication of notice of calls for installments of stock may be proved by the affidavit of the book-keeper in the employ of the publisher of the newspaper in which it was made.

Such notice is sufficient if published once, sixty days before the time fixed for payment.

False representations of an agent of a railroad company soliciting stock, that the persons undertaking to construct and equip the road were able to complete it without any advance from the company out of their own resources, are no defense in an action upon a subscription.

The testimony of a witness that, from his knowledge of the country, a railroad could have been built cheaper upon one route than another, is too vague to influence a jury.

In a suit upon a subscription of stock, the circumstances connected with the payments, and the amount called for, and the amount paid, are proper evidence as to the application of, or intention to apply, the money paid; and the attorney of the defendant may be compelled to testify as to the contents of receipts in his possession, or the defendant may be compelled to produce them.

Wednesday,  
May 30.

APPEAL from the *Jefferson* Circuit Court.

HANNA, J.—Suit for two installments of a stock subscription. Verdict and judgment for the plaintiffs below.

A great number of points were reserved and made for the consideration of this Court.

First. Interrogatories were filed with the answer, and an order obtained, that the president and secretary of the company should answer the same under oath; and it is objected that the affidavits to such answer are not properly authenticated; nor was the oath administered by a person authorized, &c.

The affidavit of the president was made before, and certified by, a commissioner, in the city and state of *New York*, appointed under the 1 R. S. p. 231; and the case of *Draper v. Williams*, 8 Blackf. 574, is relied upon to sustain the objection. That case was decided under the R. S. of 1843, p. 200, which was not the same as the one now in force. Proof of identity is not now necessary.

The affidavit of the secretary was made before a notary public, in *Cincinnati*; and it is insisted that such officer was not authorized, &c. To this it is answered that § 281, p. 91, and § 289, p. 95, 2 R. S. do not conflict; but that the first should govern as to this authentication, as well as in reference to the power to take, &c. This point it is not

necessary to decide, because, in our opinion, the statute of *Ohio*, introduced on the trial, sufficiently showed that, in that state, the officer named had authority to take and certify the affidavit, and § 281 then makes such certificate presumptive evidence in this state.

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AND MISSISSIPPI RAIL-  
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The Court overruled a motion to strike out a part of the answers of the interrogatories. This raises the second point.

The question was as to the cost of the construction of the road. The answers, after stating cost, gave the reasons for the increase over the amount contemplated, &c. The ground of the motion was, as to the latter part, first, that it was mere opinion; second, that it was not relative matter in avoidance. 2 R. S. p. 97.

Perhaps the parts of the answers pointed out, were subject to the objections named; but as the statutes were immaterial and could not, as we can see, influence the decision, the judgment should not be reversed in consequence of the refusal to strike out.

Upon the trial the plaintiffs offered in evidence a copy of the record of the acts of the corporation, in ordering calls, &c. Annexed was an affidavit under 2 R. S. § 284, p. 93.

It is insisted that this statute has reference only to corporations having their principal office and place of business in *Indiana*. We do not think so. The statute is general; lays down a rule as to evidence that shall be received and the force thereof, without reference to the place where the evidence may have been taken.

It is further said that in the action of the board on call number nine, no place, or per cent. of payment, was fixed. To this it is answered, by the opposite party, that the charter limited the amount that could be demanded *per annum* to fifteen per cent.; that ten had already been called; that in the notice, and not the call, by the charter, it is required that the amount, time, and place of payment should be specified. We think, under the circumstances, the call was sufficiently explicit.

The plaintiffs, to prove notice of said calls, introduced

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copies thereof, and the affidavit of one styling himself a clerk or book-keeper in the office of the newspaper in which the publication was stated to have been made. Two objections were made, which we will notice. First, that the charter authorized calls by giving sixty days' notice in some newspaper, &c.; that this was inserted but a single time, whereas it should have been continuously, &c. Second, if the publication was proper, the proof thereof was insufficient, because it could not be made by affidavit. As to the latter objection, the statute, 2 R. S. § 287, p. 94, provides as to the proof of advertisements in certain cases, and *Unthank v. The Henry, &c., Turnpike Company*, 6 Ind. R. 125, seems to recognize the same mode of proof as sufficient in giving notice of calls for installments, &c. As to the former objection, the charter requires sixty days' notice, and not sixty successive days' notice by publication. Was the notice proved sufficient? We are of opinion it was. The notice was not required to be published in different numbers or issues of a newspaper. The notice began to operate from the time it was given. It was not by the statute required to be renewed, as in some other instances. Other objections were made as to the introduction of evidence, which makes it necessary to notice the issues.

The complaint embodied the subscription, and averred that calls had been made, notices given, and a failure to pay, &c.

Answer, first, a general denial; second, payment; third, that the subscription was obtained by fraud in the agent representing that the road would be constructed, under a contract then made with responsible and solvent contractors, for 9,000,000 dollars; that *Ripley* and *Jennings* counties had each subscribed 50,000 dollars, &c.; that said representations were false, &c.; fourth, counter-claim.

Reply in denial.

On the trial the defendant offered to prove that the soliciting agent of the company represented to the defendants that the persons having the contract to construct and equip the road, were able to complete the same, without any advance from the road, out of their own resources, and that



such representations were false. The evidence was properly rejected. It did not directly fall within the issues, and if it had, would, perhaps, have been immaterial. We cannot see how either the truth or falsity of such statement should have influenced the action of the defendant in subscribing.

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A witness, in answer to a question directed to that point, was permitted to state, that from his knowledge of the country, the road could be built cheaper upon one route surveyed than another. He was not an engineer. It is insisted that this is the expression of an opinion by one not an expert. Whether it was such an expression or not, we need not stop to decide, for two reasons: first, if such an expression, it was in such a vague form as to have had no influence with the jury; and, second, it was a statement upon a matter that was not legitimately involved in the issues being then tried.

It was proved by the answers to interrogatories, that the defendant had paid 140 dollars; to show the application of these payments, the plaintiffs were permitted to give in evidence certain calls, other than those sued on, although those calls were made, and were for installments due, before the subscription in this case; and was, also, permitted, in the same connection, and for the same purpose, to examine one of the counsel for the defendant, as to the contents of receipts given for payments made. Notice was given during the trial to said attorney to produce the receipts, which he refused to do; and objected to testifying as to the contents, on the ground that any and all information he had in relation thereto, was derived from the receipts, placed in his hands as attorney in the case.

The circumstances connected with the payments, were proper evidence to go to the jury, upon the question of the application, or intention to apply, the money so paid.

The amount of the installments called for, and the amount paid, were proper items of evidence to go to the jury upon that question.

The notice to the attorney was sufficient, he having stated that he had the receipts then in his possession. As

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to whether he could be compelled to testify as to the contents, we are of opinion that he could. The party himself might have been compelled, under the statute, to produce the receipts on the trial. He could not defeat the production of that evidence by passing it into the hands of his attorney. He could still have been compelled to produce it. The attorney stood in no more secure position.

Voluminous instructions were given and refused. We have carefully examined them, and come to the conclusion that the rulings of the Court in reference thereto were, taken all together, correct.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*H. W. Harrington*, for the appellant.

*S. Judah*, for the appellees.

VAWTER v. THE OHIO AND MISSISSIPPI RAILROAD COMPANY.

*The New Albany, &c., Railroad Co. v. McCormick*, 10 Ind. R. 499, followed.

If the complaint is not demurred to it is good after verdict.

If a subscription of stock in a railroad company is conditioned that the road be located on a certain route, the plaintiff may prove, in a suit upon it, that the defendant owned land upon that route.

The representations of a soliciting agent with regard to the ultimate value of railroad stock, is mere matter of opinion, upon which the subscriber has no right to rely.

A witness for defendant, upon cross-examination, in this case, was asked whether the subscription was not first made "for the purpose of securing the location on the *Broadhead* survey. *Held*, that the question was not leading.

Wednesday,  
May 30.

APPEAL from the *Jefferson* Circuit Court.

HANNA, J.—Suit to recover installments on subscription to capital stock of the company.

The pleadings are similar to those in the case of *Andrews* v. the same appellees, at this term (1).

Numerous points are presented for our consideration by

the brief of the appellant. Such points, from the fourth to the fourteenth inclusive, have been considered in the case of *Andrews*, heretofore cited.

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The first question raised is in reference to the ruling of the Court striking out a part of the fourth paragraph of the answer. The part stricken out is not before us by bill of exceptions, so as to enable us to consider it.

The second point made, is upon the demurrer to the eighth paragraph of the answer, which set up that no certificate of stock had been tendered before suit, and was held bad. The decision was right. *The New Albany, &c., Railroad Co. v. McCormick*, 10 Ind. R. 499.

The third point is upon the sufficiency of the complaint. It was not demurred to. It is good after verdict.

15. The plaintiff was suffered to prove that the defendant owned a farm on one of the routes surveyed. The subscription of the defendant was, in the first place, conditional on the location of the road on that route, and after its location made absolute. The evidence was properly received on the question of the inducements which influenced him to subscribe.

16. The Court refused to hear evidence of representations made by a soliciting agent in regard to the ultimate value of such stock. This could not have been anything more than a mere matter of opinion, upon which no person should have placed such confidence as to have controlled his action in subscribing.

17. A witness, upon cross-examination, was asked by the plaintiff whether the subscription sued on was not first made "for the purpose of securing the location on the *Broadhead* survey." The question was objected to because it was leading, and sought to elicit an opinion only.

The rules of evidence are not so rigid in regard to a cross-examination, as when a party is questioning his own witness. The Court must have some discretion on that point; we see no abuse of it here. The question does not suggest an opinion as an answer. The witness might

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have been informed by the defendant as to the purpose in view, &c.

18. The question of the application of payments is made. This was a question for the jury, whether the defendant intended to apply payments upon calls made before he subscribed or not. The number of receipts he produced was equal to the number of calls made after he subscribed, but several of them were for money paid on the same day, and in the body of some of the receipts they appeared to be in discharge of calls designated by their numbers, and the corresponding numbers on the records of the corporation appear to have been made prior to the subscription of defendant. These and other circumstances, in evidence, made a proper case for a jury.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*H. W. Harrington*, for the appellant.

*S. Judah*, for the appellees.

(1) See the next preceding case.

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MAHONEY v. BLAND, Administrator.

At common law, where the real estate of the wife is sold by the husband and wife, the money or personal property received therefor by the husband, vests absolutely in him; and the statute (Acts of 1853, p. 57,) does not change the rule, as to property acquired by the wife by purchase.

Wednesday,  
May 30.

APPEAL from the *Hendricks* Court of Common Pleas.

WORDEN, J.—This was an action of replevin by the appellee against the appellant for a certain mare and colt. Trial by the Court; finding and judgment for the plaintiff in respect to the mare, a motion for a new trial being overruled.

The material facts involved are as follows: *Mrs. Clifford*, in her lifetime, was the owner by devise (not, how-

ever, to her separate use) of a certain piece of real estate, which she, together with her husband, *John Clifford*, conveyed to one *Weatherell*, in exchange for the mare in question. *John* received the mare, and kept her for some time, and then sold her to the defendant.

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1860.

HOLMAN  
V.  
CREAGMILES.

We are of opinion that on these facts the finding and judgment cannot be sustained. There can be no doubt that at common law, where the real estate of the wife is sold by the husband and wife, the money or personal property received therefor by the husband vests absolutely in him. The statute (Acts of 1853, p. 57,) does not, in our opinion, change the rule. That provides that personal property acquired by the wife during coverture, by descent, devise, or gift, shall remain her separate property, &c., but does not apply to property acquired, as in this case, by contract of purchase.

It is unnecessary for us to decide what would be the effect of an agreement or understanding that property received in exchange for real or personal property of the wife, should, like that disposed of, be the property of the wife, or be held by the husband for her use, as no such agreement or understanding was shown in the case.

It follows that *John Clifford* had a right to dispose of the mare, and that the defendant, by his purchase, acquired a good title.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*C. C. Nave* and *J. Witherow*, for the appellant.

*P. S. Kennedy* and *E. Singer*, for the appellee.

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HOLMAN v. CREAGMILES.

14	177
159	534
14	177
165	596

If in a suit by the assignee of a promissory note, the consideration for a part of which the note was executed, was an agreement to convey a valid and clear title to land, which was not complied with, there is a failure of consideration, to the extent that the defendant has paid to perfect his title; and

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1860.

HOLMAN  
v.  
CREAGMILES.

hence the amount may be set up in defense, without regard to any question of notice of the time of assignment.

A judgment against a vendor accruing between the sale and the execution of the deed, is a breach of the covenant against incumbrances. It becomes a lien upon the land to the extent of the unpaid purchase-money; and though the purchaser cannot (he having extinguished no part of the incumbrance) recover more than nominal damages in a suit upon the covenant, yet he may pay the incumbrance, and set up the amount in bar of a recovery of unpaid purchase-money. And he may set up this defense against the first note that falls due.

Wednesday,  
May 30.

APPEAL from the *Ripley* Court of Common Pleas.

PERKINS, J.—Suit upon a note. The note was given for a part of the purchase-money of a piece of ground. It was executed on the 17th day of *February*, 1857, the day the purchase, by executory contract, of the land was made. A deed, with full covenants, was executed in fulfillment of the contract on the 10th day of *July*, 1857. Between the sale of the land in *February*, and the conveyance of it in *July*, it became encumbered by a judgment against the seller. The note in suit was given for the third installment of the purchase-money, the previous installments having been paid. Before this suit was brought, the defendant paid, in extinguishment of the judgment above mentioned, an amount equal to that of the note and interest, which he set up in bar of this suit.

The suit is brought by the assignee of the note.

The consideration for a part of which the note in suit was executed, was an agreement to convey a valid and clear title to the land in question to the defendant. That agreement was not complied with, and to the extent of the amount that the defendant has paid to perfect his title, there may be said to have been a failure of the consideration for the note, which amount may, hence, be set up against any assignee of the note without regard to any question of notice of time of assignment. *Doremus v. Bond*, 8 Blackf. 368.

The judgment was, also, a breach of the covenant in the deed of freedom from incumbrance. It became a lien on the land to the extent of unpaid purchase-money. 1 Ind. R. 201.—8 Blackf. 306.

And though a party cannot, in a suit upon his covenant, recover, at all events more than nominal damages, simply for such breach, he having extinguished no part of the incumbrance (Rawle Cov. of Tit., p. 155); yet the law is well settled that he has a right, without special request, to pay off incumbrances, and set the amount up in bar of the recovery of unpaid purchase-money. *Baker v. Railroad*, 4 Ind. R. 533.—*Rodman v. Williams*, 4 Blackf. 70.—*Buell v. Tate*, 7 *id.* 55.—*Oldfield v. Stevenson*, 1 Ind. R. 153.—*Simpson v. Niles*, *id.* 196.—Ind. Dig. 792.—*Pomeroy v. Burnett*, 8 Blackf. 142.

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v.  
KIGER.

And he may set up the amount against the first note for purchase-money, that falls due after the payment. He need not wait for the last. *Rose v. Wallace*, 11 Ind. R. 112.

*Per Curiam*.—The judgment is affirmed with costs.

*W. S. Holman*, for the appellant.

*J. W. Gordon*, for the appellee.

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### COATS and Others v. KIGER.

If either party to a submission to arbitration fail to perform the award, the other party has two remedies. He may have the award made a judgment of the Court designated in the agreement to submit, or he may have an action upon the arbitration bond.

But neither of the remedies can accrue against a party who has not been served with a copy of the award.

APPEAL from the *Howard* Circuit Court.

Wednesday,  
May 30.

DAVISON, J.—*Kiger* brought an action against *Caleb Coats*, *Morgan A. Chesnut*, and *Benjamin Thompson*, upon an arbitration bond. The bond is in the penalty of 500 dollars, conditioned to abide and perform the award or umpirage of *Solomon Fortner* and *Hiram Jones*, to whose award and determination said *Kiger* and *Coats* had, at the date of the bond, by their agreement in writing, agreed to

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submit all matters of difference between them in relation to the purchase and sale of hogs, and that such submission be made a rule of the *Howard* Circuit Court.

The submission is as follows:

"We, *Abraham Kiger* and *Caleb Coats*, hereby agree to submit to the arbitration of *Solomon Fortner* and *Hiram Jones*, mutually chosen by the parties, all matters in difference between them, in relation to their partnership in the purchase and sale of hogs; and in case of disagreement, the arbitrators to select an umpire. We further agree, that said arbitration shall be made a rule of the Common Pleas Court of *Howard* county. Witness our hands and seals, this 31st of *May*, 1856. *Abraham Kiger, Caleb Coats.*"

Plaintiff, in his complaint, avers that the arbitrators on the 10th of *June* next following the date of the submission, made their award in writing, by which they awarded that *Coats* should pay *Kiger*, the plaintiff, 366 dollars, and costs taxed at 60 dollars, 70 cents. It is averred that *Coats* did not abide and perform the award in this, that he did not pay the sum awarded, or any part of it; wherefore, &c.

Defendants demurred to the complaint; but the demurrer was overruled, and they excepted. Against this ruling of the Court, the defendants rely upon two grounds—

1. The complaint does not allege that the submission was made a rule of Court.

2. It is not shown that a copy of the award was delivered to *Coats*.

The statute relative to arbitrations, under which the parties in this case proceeded, provides: "If either of the parties shall fail or refuse to comply with the award, the other party may file the same, together with the agreement of submission, in the Court named in the submission." And upon the submission being proved, and proof that a copy of the award has been duly served on the party against whom the rule is asked, the Court shall cause the submission and award to be entered of record, and grant a rule against the adverse party to show cause, &c., why judgment on the award shall not be rendered, &c.



2 R. S. pp. 227, 228, 229, §§ 1 to 13. These enactments do not, in our opinion, imperatively require the party to file the submission and the award in the Court named in the agreement to submit. They simply authorize him to do so in case he elects to have the award made a judgment of the Court. But the statute requires the parties to execute bonds with condition to abide and faithfully perform the award. *Id.*, § 3. And it may be well construed so as to allow the successful party, if he prefers it, to sue on the bond, without filing the submission and award under the agreement that the submission be made a rule of Court. The statute, if either party fails to abide and perform the award, evidently gives the other two remedies, either of which he may adopt. He may have the award made a judgment of the Court designated in the agreement to submit, or he may have his action on the arbitration bond. Unless he can pursue the latter remedy, we are unable to perceive the purpose intended by the requirement of such a bond. This conclusion is fully sustained in *Dickerson v. Tyner*, 4 Blackf. 253. And the result is, the first ground of demurrer is not well taken.

The second ground, it seems to us, is fatal to the complaint. The statute to which reference has been made, says: "A true copy of the award and of the costs shall be delivered to each of the parties, or left at his usual place of residence by one of the arbitrators, within fifteen days after the signing of the award." *Id.*, § 11. Unless this statutory requirement was fulfilled, the defendant, *Coats*, is not in default in failing to abide and perform the award. Indeed, he could not legally know that a final award had been made under the submission, until such a copy was served upon him in the mode prescribed by the statute.

Other points are made on the discussion of this case; but they will not be noticed, for the reason that the award (no copy of it having been served on the defendant within fifteen days after its rendition) is inoperative.

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v.  
KIGER.

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CREIGHTON  
v.  
PIPER.

*Per Curiam.*—The judgment is reversed with costs.  
Cause remanded, &c.

*L. Chamberlin, R. Vaile, and H. Brouse*, for the appellants.

*N. R. Lindsay and T. J. Harrison*, for the appellee.

CREIGHTON and Others, Township Trustees, on the relation of FARRAS, Supervisor, v. PIPER.

The offices of township trustee and supervisor are lucrative, within the meaning of § 9, art. 2 of the constitution.

In a suit which concerns the public, the title to an office—the officer being in the exercise of his duties—cannot be questioned collaterally, even when the officer is a party to the record.

Thursday,  
May 31.

APPEAL from the *Kosciusko* Court of Common Pleas.

DAVISON, J.—The trustees of said township [*Harrison*], on the relation of *Andrew Farras*, supervisor of road district No. 10, brought this action against *Piper*, before a justice of the peace, alleging in their complaint that the defendant did, on, &c., at, &c., obstruct a certain highway in said district, by erecting a fence across the same, to the entire obstruction thereof, &c. The justice gave judgment for the plaintiffs, and the defendant appealed.

In the Common Pleas, the parties made the following agreement of facts: “At an election in *Harrison* township, on the first *Monday* of *April*, 1857, *Andrew Farras*, the relator, was duly elected supervisor of road district No. 10, in that township. Pursuant to his election, he was duly qualified, and acted as such supervisor. After this, in *August* then next following, he was, by the board of commissioners of said county, appointed one of the board of trustees of *Harrison* township, to fill a vacancy which had occurred in that board, accepted the appointment, was qualified, and acted as such trustee; and he

14	182
124	556
127	367
14	182
142	348
14	182
149	232
150	494
14	182
153	331

continued, up until the commencement of this suit, to exercise the several duties of supervisor and trustee."

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1860.

Upon these facts, the defendant moved to dismiss the action, on the ground that when it was commenced, there was no supervisor in road district No. 10, competent to act as such, &c. The Court sustained the motion, dismissed the action, and the plaintiff excepted.

CREIGHTON  
V.  
PIPER.

The statute provides that any person who shall unnecessarily, and to the hindrance of passengers, obstruct any highway, shall forfeit the sum of 5 dollars, to be recovered before a justice of the peace, in the name of the township trustees, by the supervisor of the district; and for every day such obstruction is continued, such sum shall be recovered; and the supervisor, within three days after receiving information of such forfeiture, shall commence such suit; and that all such suits commenced by one supervisor, may be continued by his successor in office, and no costs shall be taxed against him therein. 1 R. S. p. 467, §§ 25, 26.

Section 9 of art. 2 of the constitution declares that no person shall hold more than one lucrative office at the same time; hence, it is argued that *Farras*, by accepting the office of trustee, vacated his office as supervisor; while, on the other hand, it is insisted that township trustee is not a lucrative office within the purview of the constitution. This latter position does not seem to be correct. Pay—supposed to be an adequate compensation—is affixed to the performance of the duties, both of trustee and supervisor. 1 R. S. pp. 462, 497, §§ 1, 19. This plainly determines each of them to be a lucrative office, and the offices cannot, therefore, be held by one person at the same time.

In *Daily v. The State*, 8 Blackf. 329, it was held that the offices of county recorder and county commissioner are lucrative offices within the meaning of the constitution, and that a county recorder, by accepting the office of county commissioner, vacated his office of recorder. This decision seems to be in point, and, in our opinion, settles the question under consideration.

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v.  
PIPER.

But it is said in argument, that the two offices of supervisor and trustee, though they may be incompatible, still the acceptance of the latter could only be cause for declaring the former vacant by a direct proceeding; that *Farras*, in virtue of his election, was an officer *de facto*; that all his acts as supervisor, so far as the public are concerned, are valid, and cannot be questioned collaterally. As a general rule, a collateral inquiry cannot be made into the right, *de jure*, of one claiming to exercise the duties of a public office; but the appellee contends that the question is direct, and not collateral, where the assumed officer is a party to the record, seeking to enforce a right attached to the office, or is defending his own acts under the authority belonging to the office. This is not strictly correct, where the officer sues in his own right—for instance, if he was suing to recover damages for an injury received in the discharge of his duties, such as an assault—it would be a good defense that he was not a legal officer, but a wrongdoer, who might be interrupted in an attempt to assume the duties of the office; but the acts of an officer *de facto*, though his title may be defective, are valid, so far as they concern the public, or the rights of third persons, who have an interest in the things done. *The People v. Hopson*, 1 Denio, 575, and authorities there cited.

The result seems to be, that though the officer may be a party to the record, still if the suit concern the public, his title to the office (he being in the exercise of its duties) cannot be questioned, unless in a direct proceeding having for its object the contestation of his right to hold the office. *The People v. Stevens*, 5 Hill, 630.—*Green v. Burke*, 23 Wend. 490.—*The People v. White*, 24 *id.* 520.—*Taylor v. Skrine*, 2 Const. R. 696. In the latter case, it was held that, where a person had been appointed a judge under an act which was declared unconstitutional and void, his official acts were adjudged, nevertheless, to be valid until the commission was declared void.

In the case made by the agreed facts, *Farras* evidently had no personal interest. Acting as supervisor, he was not even liable for costs. The suit having for its object the

recovery of a penalty imposed by a public statute, plainly concerned the public, who, alone, were interested. He must, therefore, so far as he acted in bringing this suit, be held a supervisor *de facto*. It follows that a recovery, in this instance, cannot be legally resisted on the ground that his title to the office is defective.

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1860.

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V.  
HORSEY.

We are of opinion that the motion to dismiss the action should have been overruled, and the judgment must, therefore, be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. L. Ketcham, I. Coffin, and G. W. Frasier*, for the appellants.

*H. C. Newcomb, J. S. Tarkington, and J. H. Carpenter*, for the appellee.

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THE STATE v. HORSEY.

APPEAL from the *Martin* Court of Common Pleas.

Thursday,  
May 31.

14	185
170	491

HANNA, J.—This was an information for failing to return a marriage certificate within the time required by statute. 1 R. S. p. 362.—2 *id.* 441. The information was, on motion of the defendant, quashed. The state excepted and appealed.

The information was sufficient. The section of the statute referred to in the second volume, being of a later date than that contained in the first volume, repealed that portion of the last-named statute fixing the penalty. The penalty fixed in the first volume was 5 dollars for each month that the failure should continue; by the statute of a later date, a person who fails to make the return, within the time fixed by law, subjects himself to a fine of not less than 5 nor more than 100 dollars. These sections cannot be reconciled, and the latter repeals the former by implication. It was not, therefore, necessary to aver that one

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month had elapsed, after the time within which the return should have been made.

TUCKER  
v.  
MAKEPEACE.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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TUCKER v. MAKEPEACE.

Thursday,  
May 31.

APPEAL from the *Madison* Court of Common Pleas.

*Per Curiam.*—An affidavit was filed by *Tucker*, alleging that in *October*, 1857, on the day he was about starting to remove from the state, a summons was served on him at the suit of *Makepeace*; that he was informed at the time that only about 10 dollars was claimed (he does not state who informed him); that he owed *Makepeace* a note of some 10 dollars, and supposed it was that for which suit was brought; but having made arrangements to pay that, and knowing that he did not owe him any other sum, and it being some distance to the office of the justice, he continued on his journey, and went out, and remained out of the state for more than thirty days after judgment rendered in said proceeding, which was for 99 dollars, 75 cents, and was not, during that time, aware of said judgment; that said judgment was wholly unjust; and therefore, &c.

The said *Tucker* thereupon moved that an appeal be authorized by the Common Pleas Court, &c., under the statute, which is as follows:

“Appeals may be authorized by the Court of Common Pleas or Circuit Court, after the expiration of thirty days, when the party seeking the appeal has been prevented from taking the same by circumstances not under his control.” 2 R. S. p. 463.

The motion was granted, and an appeal authorized.

After the transcript was filed, and the appeal docketed, the plaintiff moved to dismiss the same because the affidavit did not state facts sufficient, &c. The appeal was dismissed, which presents the only question in the case.

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1860.

THOMPSON  
v.  
NORTON.

We see no error in the ruling of the Court in dismissing the appeal. No sufficient error is shown under the statute to authorize an appeal after the thirty days, &c.

The judgment is affirmed with costs.

*M. S. Robinson*, for the appellant.

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THOMPSON v. NORTON and Others.

*A.* sold a piece of land which he held by a title-bond, and upon which he had made valuable improvements, to *B.*, assigning the title-bond, and agreeing in writing to give possession of the land and improvements on a certain future day; but before that day the improvements were destroyed by fire. *Held*, that *B.* must sustain the loss.

APPEAL from the *Marshall* Circuit Court.

Thursday,  
May 31.

WORDEN, J.—Suit by the appellees against the appellant, upon a note for 1,000 dollars, made by the appellant to one *Robert Rusk*, and by him indorsed to the plaintiff. Judgment for the plaintiff.

Several errors are assigned, but the only point made in the brief of counsel for the appellant, is the ruling of the Court below in sustaining a demurrer to the fourth paragraph of his answer; hence, no other point will be noticed.

The paragraph in question alleges that, at the time of making the note, *Rusk*, the payee, was in possession of certain real estate in the town of *Plymouth*, in the said county, which he held by virtue of a title-bond, before then executed to him by one *Nolan*, upon which real estate *Rusk* had erected buildings of the value of 4,000 dollars; that *Rusk* sold said real estate and improvements to the defendant, for the sum of 4,000 dollars, and assigned said title-bond to the defendant, and agreed to deliver the pos-

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1860.

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NORTON.

session of said real estate and improvements to the defendant, on the first day of April, 1857, which agreement was in writing, and a copy set out; that, in consideration thereof, the defendant paid to said *Rusk* the sum of 700 dollars, and gave his note for 300 dollars, which has been since paid, and also gave the note sued on, and two other notes, each for 1,000 dollars; that he has paid on the contract 1,300 dollars, which is more than the full value of the real estate, without the improvements; that *Rusk* did not deliver to the defendant the possession of said real estate and improvements, on the first day of *April*, 1857, or at any other time, but on the contrary thereof, before the first day of *April* aforesaid, and while said premises were in the possession of *Rusk*, all of said improvements, of the value of 4,000 dollars, were wholly destroyed by fire, wherefore the consideration of the note has failed.

So much of the agreement between *Rusk* and the defendant as is material to the question involved, is as follows, viz:

"This agreement witnesseth, that *Robert Rusk* has this day sold to *James Thompson* the lot upon which his building is now situate," &c., (describing it). "Said *Rusk* holds the same by title-bond from one *C. Nolan*, which has been by him assigned to said *Thompson*." After several stipulations as to the consideration of the sale, specifying the notes given by *Thompson*, the agreement proceeds: "Said *Thompson* is to procure from said *Nolan* a deed for said land immediately, and so soon as he receives the same, he is to execute to said *Rusk* a mortgage thereon, to secure the payment of said notes above specified. The possession of said property is to be delivered to said *Thompson* on the first day of *April*, 1857; from that date, the said *Thompson* is to have the use and benefit of all rents accruing from said premises, and due on said leases thereafter, said *Thompson* taking the premises, and the leases of the various tenants now occupying the same, upon the same terms and restrictions contained in said leases, releasing said *Rusk* from all liability thereon after that date."

It is insisted by the appellant, that the loss of the build-



ing, under the circumstances, should fall upon *Rusk*, and that he, the appellant, cannot be required to pay more than the lot is worth without the building. He insists that the sale and transfer were not complete; that the contract was executory, as the possession was to be thereafter delivered, and the contracts with the tenants to be assigned to him; that in analogy to the rule that prevails in reference to personal property, so long as anything remains to be done by the vendor, the title does not pass from him, and he is liable for any loss or injury to the property.

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1860.

THOMPSON  
v.  
NORTON.

The contract would seem to have been completely executed, so far as to vest *Thompson* with the same right to the property in question which *Rusk* himself had. This was a mere equitable right, and that was transferred to *Thompson* by the assignment to him of the title-bond. It was evidently contemplated by the parties that this right was vested in *Thompson*, as, in addition to what is imported by the assignment of the bond, it was stipulated that *Thompson* should immediately procure the legal title-bond from *Nolan*. The fact that the possession was not to be given until a future day, cannot be said to render the contract, thus far, executory merely. The answer does not show that *Rusk* failed to deliver possession of the lot on the day specified, but that he failed to deliver the lot "and improvements"—the latter being destroyed by fire.

We find no stipulation in the agreement, that *Rusk* was to assign to *Thompson* the contracts with the tenants of the building. Such assignment was unnecessary, in order to vest *Thompson* with the right to recover and receive the rents. 2 R. S. p. 243, §§ 7, 10.

These preliminary observations bring us to the main question in the case, viz., upon whom must the loss, under the circumstances, fall? It will be observed that there is no allegation in the answer, that the loss happened through any fault or negligence of *Rusk*, nor is there any stipulation in the agreement, that the premises were to be delivered at the time specified, in the condition they were in at the time of making the contract. The agreement specifies that *Rusk* had sold to *Thompson* "the lot upon which his

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building is now situate," and that "the possession of said property is to be delivered to said *Thompson*, on," &c.

Under the circumstances, we are of opinion that the law throws the loss upon *Thompson*, the purchaser. Even on the supposition that the contract was merely executory, this, on the authorities, would be the case. It is said, in *Sugden on Vendors*, 1 Am. ed. p. 174, that "A vendee, being equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim."

After citing a *dictum* of the master of the rolls in a previous case, to the contrary, the author goes on as follows: "In a late case, however, where *A.* had contracted for the purchase of some houses, which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the sale, and the vendor permitted the insurance to expire without giving notice to the vendee—Lord ELDON being of opinion that no valid obligation could be founded on the mere effect of the accident; because, as the party, by contract, became in equity the owner of the premises, they were his to all intents and purposes. His Lordship's decision exactly accords with the doctrine of the civil law. Indeed, it is remarkable that this very case is put in the institutes."

The same question is laid down in *Dart on Vendors and Purchasers*, p. 117. Indeed we find nothing in the books to the contrary. The case of *Combs v. Fisher*, 3 Bibb, 51, cited by counsel for appellant, is not in point. There *Combs* had sold to *Fisher* a tract of land with a cabin and other improvements thereon, and promised to deliver possession thereof at a further day, "in the same situation it then was." The cabin was burned, and rails destroyed, before the day fixed for the delivery. The Court say, "The evidence in the case satisfactorily proves the promise on the part of *Combs* to deliver possession of the place in the situation it was in when *Fisher* purchased, and that the cabin was burned and the rails destroyed be-

fore possession was delivered. *Combs'* express promise, therefore, should be binding upon him. The circumstance of the cabin having been burned by accident, as is urged by *Combs*, cannot relieve him from his express undertaking; for wherever the covenant is express, there must be an absolute performance, nor can it be discharged by any collateral matter whatever." We have seen that, in the case at bar, the answer does not show any agreement as to the delivery of the premises in the condition they were in at the time of the sale. No agreement on that subject is averred or shown.

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THE BOARD  
OF COMMISSIONERS, &c.,  
v.  
BROWN.

We are of opinion that the ruling on the demurrer to the answer was correct, wherefore the judgment must be affirmed.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

*C. H. Reeve* and *J. Bradley*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellees.

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133 210

THE BOARD OF COMMISSIONERS OF HUNTINGTON COUNTY  
v. BROWN.

THE SAME v. WEASNER.

Upon the dismissal of an appeal, the parties are out of Court; and the refileing of the record is the institution of a new suit, at least so far as to require that notice shall be given to the defendant.

A rehearing cannot be had upon an affidavit filed more than 60 days after the judgment.

Where the appellant submitted a cause in the Supreme Court without the appellee being in Court, and the cause proceeded to judgment before the error was discovered, the Court granted a rule upon the appellant, and ordered notice thereof, to show cause why the judgment should not be revoked, and the submission set aside.

APPEAL from the *Huntington* Court of Common Pleas. Thursday,  
May 31.

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1860.

THE BOARD  
OF COMMISSIONERS, &c.,  
v.  
BROWN.

HANNA, J.—Motion for a rehearing. An opinion was pronounced, and a judgment of reversal rendered, in this case, at the *May* term, 1858 (1). At the present term by affidavit on the part of the appellee, it is made to appear that the record in the cause was filed in this Court on the 15th of *November*, 1855, and notice issued, which was served a few days thereafter. At the *November* term, 1856, the appellant was called and the appeal dismissed. On the 19th of *May*, 1857, the record was refiled, and on the 5th day of the *May* term, 1857, the defendant was called, and the case submitted by the appellant. That after the refileing no notice was given nor appearance entered.

Upon the dismissal of an appeal, the parties are no longer in Court; and the refileing of the record is the institution of a new suit, at least so far as to require that notice shall be given to the defendant, &c. It is not shown by the record, in the case at bar, that any such notice was given, nor appearance entered after the refileing of the record. The affidavit was not filed until after the expiration of sixty days from the rendition of the judgment, within which time, under the statute, a petition for a rehearing must be filed.

Under these circumstances it is too late to seek relief from the judgment here rendered, by an application for a rehearing, in the precise form in which that remedy has usually been resorted to, even if it was at any time the proper mode of proceeding.

Taking the affidavit to be true, the appellee was not in Court when the case was submitted; evidently the Court was in error as to that fact, if the affidavit is correct; and the question is, what is the remedy? Our statute, in terms, has not provided any.

In some states the difficulty in analagous cases is, we believe, reached by writ of error *coram nobis*; in other Courts by motion, supported by affidavits, if need be. *Pickett's Heirs v. Ledgerwood*, 7 Peters, 144.—2 Tidd's Pr. 1056.—*De Witt v. Post*, 11 Johns. 460.—Steph. Plead. 151.—Archb. Pr. 212.—Bouv. Law Dic. 664.

It would, therefore, appear that two modes have been resorted to by Courts to correct judgments of the same Court,

based upon certain errors of fact occurring before such judgment.

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1860.

So far as we are informed, no case has occurred in which either mode has heretofore been resorted to in this Court.

THE BOARD  
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By the statute organizing this Court, authority is given to "establish modes of practice which may be necessary in the exercise of its authority;" and further, "to establish regulations respecting proceedings which are requisite in such Court, in the exercise of its authority, not specially provided for by law." 2 R. S. p. 2.

If a rule should be granted upon the appellant to show cause, if any can be shown, why the judgment and submission shall not be revoked and set aside for the error complained of, the answer might be in the form of an affidavit, and thus make an issue of fact proper, perhaps, to be tried by a jury, rather than by a contest of affidavits. If a contest of affidavits would be the necessary result of setting down a rule, we should, in consequence of our aversion to that practice, be very much inclined, if possible, to adopt a different mode of proceeding. But by statute, 2 R. S. p. 164, § 582, "All questions of fact to be determined in the Supreme Court shall be tried according to rules, to be adopted by the Court." This statute would, we are inclined to believe, authorize the submission, &c., of questions of fact thus raised, to a jury for trial (if we should determine that such was the proper mode of trial), whose decision, perhaps, either party might insist upon obtaining, under that clause of the constitution which provides that, in civil cases, the right of trial by jury shall remain inviolate. Art. 1, § 20. But this question, of the manner of trying an issue of fact thus presented, we need not now decide.

We are strengthened in our inclination to adopt this mode of proceeding, from the fact that by the statutes regulating appeals to this Court, it is provided that "writs of error are hereby abolished." 2 R. S. pp. 158, 381.—5 Ind. R. 300. And although the statutes appear to have peculiar reference to the mode of proceeding in bringing before this Court questions determined in other Courts, yet the language is so broad that it may, perhaps, include a writ of

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1860.

PARRISH  
v.  
HEIKES.

error in reference to a decision in this Court, if such could at any time have been granted.

We think, therefore, that a rule should be set down on the appellant, and notice thereof given, to show cause why the judgment heretofore rendered in this Court shall not be revoked, and the submission of the case set aside.

*Per Curiam.*—It is so ordered.

*J. U. Pettit* and *C. Cowgill*, for the appellants.

*J. R. Coffroth*, for the appellee.

(1) See the case in 10 Ind. R. 259.

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PARRISH and Another v. HEIKES.

Thursday,  
May 31.

APPEAL from the *Tippecanoe* Court of Common Pleas.

*Per Curiam.*—Suit on a promissory note, dated *December 7, 1855*, due in thirteen months, for 737 dollars, 29 cents. Judgment *October 2, 1858*, for 898 dollars, 31 cents, which was an excess of 84 dollars, 35 cents. If that sum is remitted, the judgment as to the balance will be affirmed; if not, it will be reversed; in either event at the cost of the appellee. As to all other points, this case is similar to one between the same parties at this term (1).

NOTE.—Afterwards defendant remitted 84 dollars and 35 cents of the judgment.

*J. L. Miller*, for the appellants.

*S. A. Huff* and *R. Jones*, for the appellee.

(1) *Post*.

THE STATE *v.* BOWERS.

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1860.

THE STATE  
*v.*  
BOWERS.

The subject of the act of 1857 entitled "An act to amend the first section of an act entitled 'An act concerning licenses to vend foreign merchandize, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet-show, and legerdemain,' approved June 15, 1852, and for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers," is licenses. The act is not unconstitutional for containing more than one subject.

The title of that act does not embrace concerts; and an information will not lie, under the attempted provision of the act touching the exhibition of concerts without license.

APPEAL from the *Marion* Court of Common Pleas.

Thursday,  
May 31.

WORDEN, J.—Information against the appellee for exhibiting a concert for pay without having obtained a license, &c. On the defendant's motion, the information was quashed, on the ground that there was not "any law, valid under the constitution, authorizing or requiring a license to exhibit for pay, any concert, within the state of *Indiana*."

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106 197

The act of 1857 (Acts of 1857, p. 89), which was in force at the time of the alleged exhibition, expressly requires a license to exhibit for pay any concert. The question arises whether this act, so far as it relates to any concert, was enacted in accordance with the requirement of the constitution that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title."

The title of the act of 1857 is as follows, viz.: "An act to amend the first section of an act entitled 'an act concerning licenses to vend foreign merchandize, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain,' approved June 15, 1852, and for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers."

Is there anything in the title of the original act (thus set forth in the title to the amendatory act), or in the title to the amendatory act itself, that would authorize the

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enactment of the clause requiring a license to exhibit a concert for pay?

We will inquire, first, whether the title to the original act is sufficient in this respect. The subject of the original act is licenses. This is the general subject of the act, applied and limited to the matters enumerated. If the license upon each kind of business or exhibition should be considered a subject distinct and separate from the license on the others named, then, perhaps, the act would be void as embracing some seven different subjects. But, as before remarked, the subject of the act is licenses, and it seems to us that the legislature may, without violating the constitutional provision mentioned, in the same act, require a license to be paid for carrying on different kinds of business, or for making different kinds of exhibitions. Hence the act is not void as embracing more than one subject. But although the general subject of the act is licenses, and although the legislature may, in the same act, require a license for different kinds of business or exhibitions, still the title in question limits the application of the general subject to the particulars enumerated. Had the title been an act to require the payment of licenses in certain cases, a different question would have been presented. In such case, the subject would not have been limited to enumerated particulars, as is done in the title in question. The specification in the title, of the cases in which licenses are to be required, entirely negatives the idea that the act itself extends beyond the cases enumerated. Now had the clause requiring a license to be paid for exhibiting a concert for pay, been contained in the original act, it would have been void; because the title specified the particulars in which a license was to be required, and a "concert" is not amongst them. This point is illustrated by the case of *The State v. Wilson*, 7 Ind. R. 516. There it was held that the title "an act to revise, simplify, and abridge the rules of practice, pleadings, and forms, in civil cases, in the Courts of this state," did not authorize the enactment of forms in criminal cases, because the title did not ex-



press the subject of those forms. There the subject of the enactment was limited in the title to civil cases, and it was held that an enactment on the same subject, in reference to criminal cases, was void. So here the subject of the statute, as expressed in the title, is licenses in particular, specified cases; and an enactment requiring a license in other cases than those specified, would, for the same reason, be void.

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v.  
BOWERS.

It is insisted, however, that the enactment requiring a license for exhibiting a concert is properly connected with the subject of the license required in the cases specified in the title of the act in question. However proper it might be, viewed merely as a legislative question, and in the absence of any constitutional restriction, to connect in the same law a provision for a license to exhibit a concert, with one to exhibit a puppet show, or anything else mentioned in the title under consideration, we think they are not properly connected in the sense meant by the constitution. Indeed, they do not seem to have any connection at all. The position assumed would virtually destroy the constitutional restriction. It would permit, under a title specifying a given subject, the enactment of laws generally, upon all subjects that might be properly legislated upon in connection with the subject specified. This was evidently not the intention of the framers of the constitution. The language employed, "matters properly connected therewith," is not to be construed as meaning "matters that may with propriety be connected therewith." The plain and obvious import is, that the matters must be, in and of themselves, properly connected with the subject, and not such merely as might with propriety be brought into connection. This point may be illustrated by reference to the case of *Mewhèrter v. Price*, 11 Ind. R. 199. Under the title of "an act concerning promissory notes and bills of exchange," the legislature had provided "that all promissory notes, bills of exchange, or other instruments of writing," signed, &c., should be negotiable by indorsement thereon. It was held that the clause concerning "other instruments of writing," was void, the subject

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thereof not being expressed in the title. Now it might be eminently proper to connect "other instruments of writing" with bills of exchange and promissory notes, in determining, by legislative enactment, what should be negotiable; yet such other instruments are not of themselves properly connected with bills and notes. So in the case at bar, a license for a concert has no proper connection with a license for anything else specified in the title to the act, however proper it might be to legislate upon them in connection with each other.

We are of opinion that the title to the original act is not sufficient to sustain the enactment in question. The title to the amendatory act adds nothing to the other, except the proposition that it is an act "for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers." It is evident that the subject of a license for a concert is not expressed in anything that is thus added. For the purposes of this case, the amendatory act may be considered as entitled an act merely to amend the former act, without in any manner indicating the nature of the amendment.

We think it clear that in such amendatory act, under such a title, nothing can be introduced except such matters as might have been incorporated in the original act under its title. Were it otherwise, the constitutional restriction might be totally evaded. Under titles purporting merely to amend former acts, laws might be passed on subjects in no manner expressed in the title of the original act, or of the amendatory one.

This view in no manner conflicts with the decision of this Court in the case of *Reed v. The State*, 12 Ind. R. 641, which, perhaps, goes as far as any decided case in sustaining legislation. There the nature of the amendment was set forth in the title to the amendatory act, viz., "so as to extend the jurisdiction of said Court in certain cases." It was held that the subject of the statute amended was the jurisdiction of the Court, and that the title to the amendatory act was sufficient to sustain an enactment giving the Court jurisdiction in criminal cases.

We think the information was correctly quashed, for the reason given (1).

*Per Curiam.*—The judgment is affirmed with costs.  
*D. M. Donald* and *A. G. Porter*, for the state.

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ANDERSON  
v.  
THE KERNS  
DRAINING  
COMPANY.

(1) See *Igoe v. The State*, post.

ANDERSON v. THE KERNS DRAINING COMPANY.

14	199
198	70
14	199
145	573

A draining company organized under the act of 1852, are not bound, upon an answer of *nul tiel corporation*, to prove upon the trial the existence of the corporation.

The act is not unconstitutional.

The rights of eminent domain and taxation, may be exercised for public purposes, where no constitutional restriction forbids it.

There is no constitutional prohibition upon local taxation for objects in themselves local.

This case distinguished from the school cases.

The draining of marshes and ponds, for the promotion of the public health, is regarded as a public object, for the furtherance of which taxes may be assessed; but the draining of farms to render them more productive, is not such an object, and a corporation organized for that purpose could not levy and collect a tax.

APPEAL from the *Cass* Circuit Court.

Thursday,  
May 31.

PERKINS, J.—The *Kerns Draining Company* was organized under the act to authorize the construction of levees and drains, approved *June* 12, 1852, and found in 1 R. S. at p. 257.

The company constructed a drain, and assessed *Anderson*, for benefits thereby conferred upon him, a fraction less than 30 dollars.

*Anderson* refused to pay; the company sued him, and obtained judgment below.

Two questions arise in the case—

1. Was the company bound, upon the answer of *nul tiel corporation*, to prove, on the trial, the existence of the corporation?

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COMPANY.

2. Is the law authorizing the creation of the corporation constitutional?

Section 5 of that act declares that the existence of the corporation shall be judicially taken notice of in the counties where its articles are recorded. This seems to impose upon the Court the duty of examining the recorder's office, and determining for itself the fact, from an inspection of the record, whether there is, in the county, a legally organized draining, &c., company. It makes the question one of law, to be decided by the Court, like the question as to the time when given public laws take effect. Under such an issue, and, perhaps, under any state of the pleadings, the Court is bound, if it finds there is no such organized company (a fact it is bound to ascertain the existence or non-existence of), to dismiss the suit.

In considering of the constitutionality of the act, it will be proper, in the first place, to ascertain exactly what it provides for—what it authorizes to be done.

It authorizes property to be taken for the public use, and improvements to be made for the public benefit, and the assessment of taxes to pay for such property and improvements. It provides, then, for the exercise of the right of eminent domain, and of taxation for public purposes; and for such purposes these rights may be legitimately exercised.

The statute does not assume to designate the particular cases in which the right should be exercised, to locate the particular levees and drains which would be of public use and benefit; but asserts, generally, that such as are, may be constructed pursuant to the act, and leaves it a question for the Court to determine in each particular case, whether the levee or drain in that case is for public use or benefit. Where no constitutional restriction forbids it, such exercise of the right of eminent domain, and of the power of taxation, is legal. 7 Ind. R. 576.—*The People v. The Mayor, &c.*, 4 Comst. 419.

Is there any restriction upon such taxation in our constitution?

Section 1, art. 10 of the constitution, declares that the

legislature shall provide for a uniform and equal rate of taxation, and for a just valuation of all the property in the state; and by §§ 22 and 23 of art. 4, local laws authorizing taxation are prohibited. But it has already been decided that these provisions do not prohibit local taxation for objects in themselves local. *The City of Lafayette v. Jenners*, 10 Ind. R. 75. They require a general, uniform levy for state purposes, but they do not forbid local taxation under general laws. *The Bank v. The City of New Albany*, 11 Ind. R. 139. Nor do we think they prohibit indirect taxation by way of licenses upon particular pursuits, &c. See Walk. Am. Law, 3d ed., p. 122. Such indirect taxation may be made effectual as a police regulation. The taxing, which is a part of the legislative power of the state, is supreme, except where limitations are imposed. See *The City of Aurora v. West*, 9 Ind. R. 74. Indirect taxation, by way of tariffs, &c., has ever been regarded a legitimate exercise of the taxing power; and we do not think a provision in the constitution requiring the general levy of direct taxes for state purposes to be upon a uniform assessment, implies a prohibition of all other taxation. Such, at all events, is not the conventional force of its language.

The case at bar differs from the school cases in this, that the school law, under which they arose, was operative all over the state, and, hence, required uniformity of taxation for the support of common schools in every district in the state, common schools being a state institution; which uniformity was broken by local taxation for their support in a part of the districts, additional to that of the state, as would be the case in regard to the general levy for general state purposes, if, for these purposes, local taxation, additional to the general levy, was permitted.

But private property must be taken only for public use, and local taxation must be permitted only to defray expenses in cases of public use and benefit. And if the tax assessed in the case at bar was for such public use and benefit, the mode of its assessment, it seems, was unobjectionable. *The People v. The Mayor, &c., supra.*—Wood-

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ANDERSON  
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DRAINING  
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*ruff v. Fisher*, 17 Barb. (N. Y.) 224.—*Hartwell v. Armstrong*, 19 *id.* 166.

What is to be regarded as a public object in the taking of private property, and in the assessment of taxes, is a question of great difficulty, in many cases.

The building of mills has been held such. *Hankins v. Lawrence*, 8 Blackf. 266. The construction of canals and railroads and public highways, has been held such. *Dronberger v. Reed*, 11 Ind. R. 420.

So has the improvement of streets in a city, for they are public highways. *Snyder v. Rockport*, 6 Ind. R. 237.

So has the draining of marshes and ponds for the promotion of the public health. See *Hartwell v. Armstrong*, *supra*. But the draining of a man's farm, simply to render it more valuable to the owner, would not be a work of public utility, in the constitutional sense of the term; and a corporation organized and acting for such a purpose, would no more be acting in a public undertaking, than would a company organized and acting for the clearing up of men's farms and putting them in a better state of cultivation than the proprietors were willing to do, though the public and adjoining proprietors might be, in a substantial degree, benefitted by the operation. And forcible taxation to pay for the benefit would hardly be tolerated.

In this case, the evidence is not upon the record, and, hence, we must presume a case of public benefit was made out.

It appears by the record that a demurrer was filed; but that, without waiting for a decision upon it, the party answered over. He thereby waived his demurrer.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*H. P. Biddle* and *B. W. Peters*, for the appellants.

*D. D. Pratt*, for the appellee.

## HARDY v. MERRIWEATHER.

May Term,  
1860.HARDY  
v.  
MERRIWEA-  
THER.

A railroad company has power to take notes originating in a transaction, or to secure an indebtedness, within the scope of their corporate undertaking; and as a general proposition, a corporation has power to assign a note that it has power to take.

The abandonment of the construction of a railroad, does not, of itself, constitute a defense to a suit to recover debts due the company: whilst the corporate organization remains, they may collect dues in their corporate name, for the payment of debts.

The general denial admits the capacity of the plaintiff to sue.

Representations that the company have stock enough to complete the road, and would do it in two years, are too vague to constitute a defense to a suit on notes given for an installment of a subscription.

An answer, in such a suit, denying that the company has given the defendant his stock, is bad—they are at most only bound to conditionally tender it.

APPEAL from the *Scott* Court of Common Pleas.

Thursday,  
May 31.

PERKINS, J.—Suit upon promissory notes. Judgment for the plaintiff.

The complaint alleged that the notes were executed by *Hardy* to the *Fort Wayne and Southern Railroad Company*, and that, on the 16th day of *February*, 1859, they were assigned by said company to the plaintiff, the assignment being executed by *Eli McCauley*, the company's treasurer.

The defendant answered in eight paragraphs—

1. By the general denial.
2. Averring abandonment of the construction of the road by the company.
3. Payment.
4. Averring that, at the date of the notes, the company represented to the defendant that they had stock enough subscribed to complete the railroad in two years, and that it would be completed in that time, which representations were not true.
5. Setting up a set-off.
6. Averring that the company have not assigned to the defendant stock subscribed by him.
7. Averring abandonment, as in the second paragraph.

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1860.

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v.  
MERRIWEA-  
THOR.

8. Denying the power of the company to assign the notes.

A demurrer was sustained to all the paragraphs of the answer, except the first, third, and fifth.

Upon those, issues of fact were formed, tried, and found for the plaintiff below.

No evidence was offered to sustain the answer of payment.

The set-off relied upon consisted of scrip issued by the railroad company.

The only evidence tending to support the answer of set-off was the testimony of *Elisha G. English*. He stated that the defendant applied to him to obtain a quantity of the scrip of the company, then held by him as the agent of the company; that an arrangement was planned to let the defendant have the scrip, but that it was not consummated till about the time of the trial, when the scrip was delivered.

This evidence did not establish the existence of a set-off before notice of the assignment of the notes.

And it might here be inquired how it came that the agent of the company had scrip of the company to sell for the company. Was it scrip that had been issued to creditors, and once redeemed? Why not pay the debt to the company, rather than buy scrip of the company to pay the debt with. Was the scrip reïssuable?

In this case, these questions are of no importance.

We now proceed to examine the answers held bad on demurrer; and,

1. Of the denial of the power of the company to assign the notes.

The company had power to take the notes. They originated in a transaction, and were to secure an indebtedness, within the scope of the corporate undertaking. *Smead v. The Indianapolis, &c., Railroad Co.*, 11 Ind. R. 104. And, as a general proposition, a corporation has power to assign a note that it has power to take. See *Hankins v. Shoup*, 2 Ind. R. 342. The assignment, in fact, being set out in



the complaint and not denied by answer under oath, was admitted.

May Term,  
1860.

2. The abandonment of the construction of the road does not, of itself, constitute a defense to a suit to recover debts due the company chartered to accomplish such construction. Abandonment of the prosecution of the undertaking does not release the company from debts contracted while its prosecution was continued; and while the corporate organization remains, dues to the corporation may be collected in the corporate name for the payment of debts. After the corporate existence has ceased, creditors may still pursue its assets by proceedings against the debtors and stockholders. Redf. on Railw., p. 77, and note.

HARDY  
V.  
MERRIWEA-  
THER.

In this case, the general denial was answered, and that answer admitted the corporate capacity of the plaintiff to sue.

3. The representations that the company had stock enough to complete the road, and would do it in two years, are too vague, and manifestly nothing more than expression of opinion. No amount of stock was stated as being subscribed, nor does it appear but that the defendant knew the exact amount, and its probable solvency, so that he could judge for himself whether it was sufficient for the construction of the road. See *The Railroad Co. v. Rodrigues*, 10 Rich. (S. C.) 278; *Anderson v. The Newcastle, &c., Railroad Co.*, 12 Ind. R. 376.

4. The answer denying that the company had given the defendant his stock, is bad. Suppose, as the appellant contends, that the delivery of the stock and the payment of the notes were to be concurrent acts, like the delivery of a deed and the payment of the last installment of purchase-money on a contract for the sale and conveyance of real estate; still the company were bound to conditionally tender only, not actually deliver the stock. This was settled in *Gorham v. Reeves*, 1 Ind. R. 421.

In this case, therefore, the answer did not deny the performance of the act the company were bound to perform, even on the supposition that they were bound to perform

May Term, 1860. some act. See, however, *The New Albany, &c., Railroad Co v. McCormick*, 10 Ind. R. 499.

MILES  
v.  
OHAVER. *Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*W. K. Marshall*, for the appellant.

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MILES v. OHAVER.

Upon money paid to a judgment-creditor before an execution issues, or after the execution is issued but before it is in any manner served, the sheriff is not entitled to commission.

And where the execution-defendant delivered to the sheriff his receipts, taken for such payments, it was held that they could not be considered as money—that the sheriff had no right to receive them in satisfaction of the execution.

Thursday,  
May 31.

APPEAL from the *Hendricks* Circuit Court.

WORDEN, J.—Suit by *Miles* against *Ohaver*. The facts are agreed upon, and are substantially as follows, viz.: In the year 1858, *Ohaver*, as sheriff of *Hendricks* county, had in his hands for collection, executions against *Miles* and one *Banta*, amounting to 1,240 dollars, in favor of *Montgomery* and *Carmichael*. *Miles* paid to the plaintiffs in the executions (and not to the sheriff) the sum of 1,008 dollars, 97 cents. A part of this sum was paid before the executions were issued, but the amount was not credited upon the judgment; and the balance of the above-named sum was paid after the executions were issued, but before service thereof. The receipts of the plaintiffs for the 1,008 dollars, 97 cents, were passed to the sheriff, and returned by him, as the agreement says, “in satisfaction of the executions.” *Miles* paid off the balance of the executions. On the final settlement of the executions, *Ohaver* charged and retained, as commission on the amount of 1,008 dollars, 97 cents, thus paid by *Miles* to the execution plaintiffs, the sum of 16 dollars, to recover back which this suit

is brought. It is agreed that, if *Ohaver* was not entitled to the 16 dollars thus received by him, judgment is to be rendered for the plaintiff—otherwise, for the defendant. The Court below rendered judgment for the defendant. *Miles* appeals to this Court. The suit is unimportant in itself, but it has some importance so far as the question involved affects the rights of sheriffs and execution-defendants.

May Term,  
1860.

MILES  
v.  
OHAVER.

The statute regulating sheriffs' fees, Acts of 1855, p. 104, allows for "selling property on an execution, a commission of five per centum on the first 300 dollars, and two per centum on any excess above that amount; but when the money is paid to him without sale, one-half commission only shall be allowed."

This statutory provision cannot be so construed as to entitle the sheriff to a commission on the 1,008 dollars, 97 cents, upon the facts agreed upon. It is very clear that, upon the money paid before the execution issued, no commission can be allowed; nor do we think that any can be allowed upon that paid to the plaintiffs in the execution, before the sheriff had in any manner served it.

The statute allows the sheriff full commission where the money is made by a sale of property, and half commission where the money is paid to him without sale. This would not seem to embrace a case at all where no property is sold, and where no money is paid to the sheriff. Here a part of the money on which commission was charged, was paid before the execution was issued, and the other part was paid before it was served, and the case is not within the letter or spirit of the statute. The case of *Vance v. The Bank of Columbus*, 2 Ham. (Ohio) 215, is in point. Here a levy had been made upon real estate, and the execution returned not sold for want of buyers, and a *vend. exp.* had been issued and returned in like manner. Afterwards, the debt and costs, except poundage, were paid. Poundage was claimed. The Court say: "The phrase 'money made on execution,' can only relate to such sums as are actually paid into the sheriff's hands upon the execution. The money is not made by the officer when paid

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1860.

MILES  
V.  
OHAYER.

directly by the debtor to the plaintiff. A different construction would imply that the poundage was given merely to swell the bill of costs, and increase the sheriff's perquisites, and to this we cannot consent."

It is insisted, in the case at bar, that as *Miles* passed over to the sheriff the receipts of the plaintiffs in the execution, and as the sheriff received them in satisfaction thereof, they should be regarded as money. We think otherwise. The sheriff was under no obligation to receive them, nor was *Miles* under any obligation to pass them over to him. *Miles* had paid so much on the judgments, and if the plaintiffs in the execution sought to levy and collect that amount again from him, he had a legal remedy to prevent it. So the sheriff, having an execution in his hands, would have a right to proceed with the collection thereof, until legal steps were taken to arrest his action in the premises. He could not receive the receipts in satisfaction of the executions. At most, they were mere evidence of a previous payment, and he took them at his peril.

The receipts could not be taken by the sheriff as payment, though they might have been evidence of a previous payment. They were not money, though they might have shown why the money was not levied and collected. The fact that they were taken by the sheriff, and returned by him, does not invest them with the character of money paid to him, so as to entitle him to the percentage thereon as for money paid to him.

We are of opinion that the Court below erred in its application of the law to the facts, and that the judgment must be reversed.

*Per Curiam.*—The judgment is reversed with costs, Cause remanded, &c.

*L. M. Campbell*, for the appellant.

*J. S. Miller*, for the appellee.

## HARRIS v. RUPEL.

May Term,  
1860.HARRIS  
v.  
RUPEL.

No affidavit is necessary to the proper determination of a motion for a new trial based upon excessive damages, insufficiency of evidence, and verdict contrary to law.

In suits for seduction, verdicts are seldom disturbed on the ground of excessive damages.

Where the evidence tends to support the verdict, it will seldom be disturbed on the ground of insufficiency of evidence.

Time will not be given to enable a party to prepare affidavits to support his reasons for a new trial, unless in addition to a good excuse for their non-production, it be made to appear of record that it is in the power of the party to procure sufficient affidavits.

Where a motion for a new trial had been overruled for the want of affidavits sustaining the reasons upon which it was based, and a second motion was made and the necessary affidavits presented, the latter motion was held to have been properly overruled, because no excuse was shown for the non-production of the affidavits upon the first motion.

Where one of the reasons upon which a motion for a new trial was based, was newly discovered evidence, the nature of which was set out in proper affidavits, and counter-affidavits were filed, directly contradictory of those affidavits, it was held that a question was presented for the Court, the decision of which the Supreme Court could not disturb.

In a suit for the seduction of the plaintiff's wife, her statements are not competent evidence for the defendant.

The affidavit of a physician disclosing communications made to him, as such, by the wife, to the effect that she had had an abortion, from having had illicit intercourse with a certain person during the absence of her husband, will not sustain a motion for a new trial, based upon the discovery of such evidence, unless it be also shown that the wife would consent to such disclosure upon the trial.

Affidavits evidently false, or contradictory, upon their face, of the evidence upon the former trial, will not sustain a motion for a new trial upon this ground.

Nor will the affidavit of the defendant that he can prove by *A. B.* and by *D.*—christian name not known—that they had had sexual intercourse with the wife, of which the plaintiff was cognizant, sustain a motion for a new trial on account of the discovery of such evidence, unless it be shown by the affidavit of the proposed witnesses that they would so testify.

APPEAL from the *St. Joseph* Circuit Court.

Thursday,  
May 31.

HANNA, J.—This was a suit by *Rupel* against *Harris*, for the seduction of his wife. Denial. Trial by Jury. Verdict and judgment for plaintiff for 5,000 dollars.

After the return of the verdict, and before judgment, a

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1860.

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HARRIS  
v.  
RUFEL.

motion was made for a new trial, in which the reasons assigned were—

1. Excessive damages.
2. Misconduct, &c., of the plaintiff.
3. That the evidence was insufficient.
4. That it was contrary to law.
5. Newly discovered evidence.
6. Surprise.

Upon the return of the verdict, namely, at two o'clock in the afternoon of *October 21*, notice was given of the motion for a new trial. On the next day, the reasons were filed, and a motion made that further time be granted to prepare and file affidavits in support of the motion, which was based upon the statements of counsel that, because of other engagements, they had not been enabled to prepare said affidavits.

The motion to postpone was overruled, and the ruling excepted to, as was also the motion for a new trial. No affidavits appear in the record, supporting the motion for a new trial. After judgment, to-wit, on the 28th day of *October*, the defendant renewed his motion for a new trial, for the same causes assigned on the first motion, and also for additional reasons, namely, for evidence discovered since that motion was determined. Which was also overruled.

The evidence is in the record. No affidavit was necessary to the proper determination of the motion for a new trial, as based upon the first, third and fourth reasons. We can, therefore, examine them.

As to the first: Verdicts, in cases of this character, are seldom disturbed because of the amount found for the plaintiff. That amount depends so much upon the facts and circumstances of each individual case, and the sound legal discretion of the jury, that no very definite rule can be laid down in regard thereto. In the case at bar, the plaintiff had been absent for six years in *California*, leaving his wife and three children in rather indigent circumstances, but under an arrangement to be provided for by her father, who died during the absence of plaintiff; that plaintiff sent back some money; that his wife removed for

some time from his small farm, into a house of the defendant; that they appeared to live agreeably before he left; that her character had not, so far as shown, been before that time questioned. Much evidence was introduced tending to show improper intimacy between the defendant and the wife of the plaintiff, in his absence; that soon after his return, defendant and she went to *Michigan*, where he left her; that her husband went after and brought her back; that she did not remain with him, but went to live in a house of said defendant. Under all these circumstances, the amount which the jury should award as damages, was a question so peculiarly within their province, that we cannot disturb the verdict for that reason.

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v.  
RUPEL.

The third cause assigned, for the same reason, cannot prevail. The evidence tends—perhaps it might be said, strongly tends—to sustain the finding upon the question involved, of the guilt of the parties.

As to the fourth reason, no question is made in argument to which it is applicable.

The second, fifth, and sixth reasons, assigned upon the first motion, remain to be disposed of. All those reasons are so assigned as to require to be supported. As before stated, no affidavits were filed. The ruling of the Court upon the motion for a new trial based thereon, was right. The only question in this connection is, whether the Court erred in refusing the postponement, to prepare such affidavits. The verdict was returned at two o'clock; notice of the motion then given; the motion made, and reasons filed the next morning, and postponement asked; upon which the statement in the bill of exceptions is, that the defendant "moved the Court for further time to prepare and file affidavits in support thereof, and defendant's counsel stated to the Court that they had been unable, on account of want of time, and by reason of their being engaged on the day previous thereto, to prepare said affidavits." There was really nothing before the Court, in any tangible form, from which the Court was able to determine, or be informed, that it was in the power of the defendant to procure the necessary affidavits to sustain the reasons assigned

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V.  
RUPEL.

for a new trial; nor was there anything, except the mere statement of the counsel, excusing their non-production at the time the motion was determined. Something should have been presented to the Court, to go upon the record, in such substantial form as to have justified the Court in acting. The affidavit of the plaintiff upon the one point, and of the counsel upon the other, would have presented one mode of putting the matter upon the record. It is not within the ordinary usages of practice to entertain a second motion for a new trial, after overruling the first. Indeed we do not see very well where litigation would end, if repeated motions should be thus heard, based upon the same reasons of the first. Then, as to the same reasons assigned in each motion, we think it was, so far as this record shows, to say the least, an irregular mode of practice, and the reception of counter-affidavits, upon the same points, was equally so. As that whole proceeding, thus far (no extraordinary circumstances being involved), appears to us as irregular, we will leave it where the Court below did. Upon this second motion, affidavits were produced, to the points which should have been, in that manner, sustained on the first motion; but no sufficient reason is shown for the non-production of the material part of them upon the first motion.

As to the question made upon the evidence discovered after the determination of the former motion for a new trial, three points are presented—first, that plaintiff procured, and improperly influenced, the testimony of his son *Charles*, a minor of the age of eleven years; second, that the plaintiff mistreated his wife; third, that she was a prostitute before the defendant became acquainted with her. Counter-affidavits were filed by the plaintiff. *Romaine v. The State*, 7 Ind. R. 63.—*The Newcastle, &c., Railroad Co. v. Chambers*, 6 *id.* 349.

As to the first point, affidavits of two persons were filed by the defendant, referring to a conversation had with the witness, *Charles*, after he had testified, in which they state he admitted he had sworn falsely, and in the manner his father desired him to do. The affidavits of the plaintiff



and the witness, directly contradictory of these two, were filed. This presented a question for the Court which we cannot disturb, even if, in any case, a new trial should be granted for such cause. 6 Blackf. 496.—7 *id.* 186.—2 *id.* 435, 608.—4 Ind. R. 492, 540.—7 *id.* 63.—1 Gr. and W. on New Trials, 496.

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HARRIS  
v.  
RUPEL.

As to the second point, the motion is principally founded on the affidavit of a physician, who testifies to the wife of plaintiff having suffered an abortion, which, in conversation with him, she impliedly attributed to certain necessary labor she performed, that should more properly have fallen to the lot of the plaintiff, but which he neglected to perform. This affidavit is founded upon the statements of the wife. Certainly, if a new trial had been granted, they would not have been competent evidence upon that point, in the case at bar. 7 Ind. R. 690.

Moreover, upon the former trial, evidence had been given in reference to the treatment of the wife by the plaintiff, but not as to this particular; nevertheless, this would have been so far merely cumulative evidence, as to have precluded us from disturbing the ruling of the Court below, if it had been otherwise admissible. 1 Gr. and W. on New Trials, 486.—3 *id.* 1046.—5 Ind. R. 250.—6 *id.* 474.

The third point is based upon the affidavit of the defendant, who only professes to make his statements from information of the physician, who derived his information whilst acting as such, and of two persons who heard the plaintiff, after the trial, make use of language which asserted the former prostitution of his wife, and his knowledge of it. The two last-named persons are the same who detailed the conversation with the witness, *Charles Rupel*. The Court received an affidavit of the plaintiff, positively denying the conversation which they impute to him.

The physician, in his affidavit, discloses communications made to him by the wife of the plaintiff, when called to visit her during his absence in *California*. There is nothing showing that she consented to such disclosure, or would, on the trial, consent thereto. That disclosure was, that

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HARRIS  
v.  
RUPEL.

she had had an abortion, and "laid the trouble to a young man by the name of *Polk*." The statute is, that no physician shall be allowed, in giving testimony, to disclose, &c., unless with the consent of the party, &c. 2 R. S. p. 82. We cannot see anything in this record to exclude the testimony of this physician from the operation of the statute. If the wife of the plaintiff should refuse to give her consent to this physician disclosing matters by her communicated to him, the material part of his testimony, even if otherwise admissible, would be excluded by this positive provision, although neither its operation, nor his own sense of professional propriety, prevented him from filing this voluntary affidavit.

As to the statements of the two witnesses who professed to have heard the charges of the plaintiff against his wife's chastity, they show upon their face that they were false, or he was sunk to the level of a beast. The other evidence in the case is not in consonance with the latter phase of this proposition. If he had been cognizant of his wife's alleged baseness, before he left for *California*, it is not very probable that he would have remitted her money, or treated her as he did upon his return. The whole evidence upon the trial, in connection with the probable effect the matters stated in those affidavits would have upon another trial, was before the Court, upon the motion, and we do not think the determination should be disturbed upon that point. 4 Ind. R. 637.—6 *id.* 474.

The affidavit of the defendant states that he believes he can prove by *Polk*, and by one *Dunlap*, or *Dunlop*, whose christian name and place of residence is unknown, that they had sexual intercourse with the wife of the plaintiff—the latter before plaintiff went to *California*, and of which he was cognizant. The affidavits of these witnesses are not filed, and as an excuse for not filing them, defendant shows that he is not informed of their place of residence; and it is evident, from the tenor of his affidavit, that he had never conversed with them upon the subject—did not know the name, certainly of one of them—nor could not know whether they would be willing to testify, if present.

It is not to be presumed, either by the affiant or the Court, that a man would voluntarily stultify himself. The ruling of the Court was, therefore, right as to that point. 6 Blackf. 439.

May Term,  
1860.

NEGLEY  
v.  
WILSON.

At the commencement of the suit, such proceedings were instituted as resulted in the attachment of the property of the defendant. The record is imperfect in reference to such proceeding. So far as shown, it was irregular, and, therefore, the judgment ordering the sale of the specific property was improperly rendered.

*Per Curiam.*—The judgment, as rendered upon the verdict of the jury, is affirmed. That part of the final order of the Court, directing the sale of the property attached, is reversed, at the cost of the appellee.

*J. F. Miller* and *W. G. George*, for the appellant.

*J. E. McDonald*, *A. L. Roache* and *C. L. Dunham*, for the appellee.

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NEGLEY and Wife v. WILSON.

APPEAL from the *Tipton* Circuit Court.

Friday,  
June 1.

*Per Curiam.*—This was a suit to foreclose a mortgage. The cause was fairly tried upon its merits. The appeal must have been taken simply for delay.

The judgment will be affirmed with 10 per cent. damages and costs.

The defense set up was, that the mortgage was given to secure the consideration of the purchase of a mill and machinery, which was represented to be in a good condition, &c., when it was not; but it was not shown but that the defendant had full opportunity of inspecting the property purchased, and judging for himself. The answer was defective in this particular; but the Court left the question to the jury whether the defendant purchased upon

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1860.

JOHNSON  
v.  
VUTRICK.

the representations, or his own judgment, and they found for the plaintiff, and a new trial was refused below.

It may be remarked, that the bill of exceptions is not signed by a judge of the Circuit Court. This Court judicially knows such judges. And were there nothing in the record showing the right of the person who signed the bill to do the act, it is probable we could not notice it. Where a person, other than a judge, performs an act in the progress of a cause, which should be performed by a judge, the record should show his right to act. It does show the special appointment in this case.

The judgment is affirmed with 10 per cent. damages and costs.

*D. Wallace* and *J. Coburn*, for the appellants.

*J. A. Lewis*, for the appellee.

14 1860  
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JOHNSON and Another v. VUTRICK.

Friday,  
June 1.

APPEAL from the *Montgomery* Circuit Court.

*Per Curiam*.—*Vutrick* sued *Johnson* and *Johnson*, *Truax* and *Truax*, *Conkhite* and *Conkhite*, *Custis* and *Custis*, and others, for a trespass upon his person. Judgment by default, except as to *Johnson* and *Johnson*, and assessment of damages—continuance as to the *Johnsons*. At a subsequent term, the *Johnsons* appeared, and a trial was had, which resulted in a verdict against them. No exceptions were taken in the progress of the cause. A motion was made for a new trial, which was overruled. It is now urged that the judgment in this case was erroneously entered upon the verdict against the *Johnsons*, because of the previous judgment against the co-defendants of the *Johnsons*. Under the former system of practice, perhaps, such an objection would have been available. See *Allen v. Wheatley*, 3 Blackf. 332. But in this case, the objection

was not raised below. See 2 Hilliard on Torts, p. 459. It was not a ground for a new trial. Ind. Pr., pp. 300, 308, No motion in arrest was made. See 2 Pet. Abr. 385. And it is now too late, under the present practice, to raise the point for the first time in this Court, even if it might have availed had it been made below. But it is doubtful if, under the new system of practice, the objection would have been valid in the Circuit Court. Ind. Pr., p. 354 to 357.—*Douglass et al. v. Howland*, 11 Ind. R. 554.

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1860.

REILLEY  
v.  
THE STATE.

The judgment is affirmed with 3 per cent. damages and costs.

*B. F. Gregory, J. E. McDonald, and R. A. Chandler,*  
for the appellants.

*D. W. Voorhees and S. C. Willson,* for the appellee.

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REILLEY v. THE STATE.

APPEAL from the *Decatur* Circuit Court.

Friday,  
June 1.

14	217
180	88
130	238
14	217
165	500

*Per Curiam*.—This was an indictment for receiving stolen goods. The defendant was convicted.

The only error assigned is, that the Court permitted the confessions of the thief, as to the fact of the larceny, to be given in evidence on the trial of this indictment against the receiver. The thief had not been tried at the time of the trial of the receiver.

Our statute creates the offense of receiving stolen goods, and provides that the receiver may be tried before the thief. 2 R. S. p. 409. When, therefore, it happens that the receiver is thus tried, it devolves upon the state to prove on his trial—

1. The larceny by some thief.
  2. The subsequent reception of the stolen goods by the prisoner.
  3. That he knew, at the time, that they were stolen.
- In proving the first proposition, viz., the larceny, it would

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1860.

BOWERS  
v.  
BOUND.

seem to be the dictate of natural reason that the state might give in evidence any matter which would be admissible if the thief were on trial; that, for the establishment of this point, his confessions, made under circumstances that would render them admissible, would be competent evidence. That our statute renders this rule of evidence necessary, would seem to be clear; but the authorities are otherwise. *The Commonwealth v. Elisha*, 3 Gray, 460.

The judgment is reversed, and it is ordered that the keeper of the state prison be notified to take the prisoner back to jail.

*J. S. Scobey*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

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### BOWERS and Others v. BOUND and Others.

The complaint in this case sought to set aside an entry of satisfaction of a judgment. This was resisted on the ground that the note and mortgage upon which the judgment was rendered, were without consideration. *Held*, that the defense was not responsive to the complaint.

APPEAL from the *Putnam* Circuit Court.

PERKINS, J.—On the 5th of *February*, 1839, *Silas Bowers* executed his note to *Thomas Bound* for 500 dollars, payable on the first of *June* following, with 10 per cent. interest, value received. He also executed a mortgage on certain real estate, to secure the payment of the note.

Subsequently, *Bound* assigned the note and mortgage to one *Thomas N. White*.

In 1845, *Bound* died.

In 1846, *Bowers* confessed judgment on the note and mortgage, at the suit of *White*, assignee.

In 1851, *White* acknowledged satisfaction of the judgment.

The heirs of *Bound* now sue to set aside that entry of acknowledgment of satisfaction, on the ground that *White*

was the assignee of the note and mortgage simply as an agent for their collection, the beneficial interest being in them as the heirs of their father, the payee; and that the satisfaction was acknowledged by *White* without receiving any part of the consideration, and fraudulently.

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1860.

MALONE  
V.  
THE STATE.

The Court set aside the entry of satisfaction. This was resisted by the defendants on the ground that the note and mortgage on which the judgment was rendered were without consideration, &c.

It strikes us that such a defense was not responsive to the case made by the complaint. That sought simply to set aside an entry of satisfaction by *White*; and as that entry was wrongly made, it was properly set aside. But that act of the Court did not affect the validity of the judgment as against *Bowers*, nor deprive his heirs of the right, if right they had, to proceed against *Bound*, or his administrators, or heirs, as might be proper in the circumstances which might exist, to set aside that judgment for any sufficient legal cause which could be made the ground of such a proceeding; or to compel an entry of satisfaction of it, by the proper parties.

This being the case, the judgment below must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*S. B. Gookins*, for the appellants.

*J. P. Usher*, for the appellees.

MALONE v. THE STATE.

“*Posey* Common Pleas Court, *June* term, A. D. 1859. *State of Indiana* v. *Thomas J. Malone*. Usury. The state of *Indiana* by *William P. Edson*, district prosecuting attorney of the Court of Common Pleas, for the district composed of the counties of *Posey* and *Gibson*, here gives the Court to understand and be informed that, on the 8th day of *December*, 1857, at and in said county of *Posey*, *Thomas J. Malone* did then and there unlawfully bargain for, exact, reserve and receive from *Sharp Wilkins*, the sum of 90 dollars, for the loan, use and forbearance of 600 dollars, lent by said *Thomas J.*

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*Malone* to him, said *Sharp Wilkins*, from the 8th day of *December*, A. D. 1857, to the 8th day of *December*, A. D. 1858, which said sum of 90 dollars so as aforesaid bargained for, exacted, reserved and received, exceeds the rate of 6 dollars for the use and forbearance of 100 dollars for one year, in a large sum, to-wit, 54 dollars, and is more than at that time was allowed by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*. *William P. Edson*, District Att'y Prosecutor.

*Held*, 1. That defect of title is not ground of quashal.

2. That the signature is proper.

3. That the venue is sufficient.

4. That the information is substantially in the language of the statute, which is sufficient.

*It seems* that where the statute defines the offense generally, and designates the particular acts constituting it, the language of the statute may be substantially followed in charging the crime; but where the particular acts are not designated, the act done must be set out.

Friday,  
June 1.

APPEAL from the *Posey* Court of Common Pleas.

PERKINS, J.—Information for usury. The information reads as follows:

“*Posey* Common Pleas Court, *June* term, A. D. 1859.

“*State of Indiana* v. *Thomas J. Malone*. Usury.

“The state of *Indiana* by *William P. Edson*, district prosecuting attorney of the Court of Common Pleas, for the district composed of the counties of *Posey* and *Gibson*, here gives the Court to understand and be informed that, on the 8th day of *December*, 1857, at and in said county of *Posey*, *Thomas J. Malone* did then and there unlawfully bargain for, exact, reserve and receive from *Sharp Wilkins*, the sum of 90 dollars, for the loan, use and forbearance of 600 dollars, lent by the said *Thomas J. Malone* to him, said *Sharp Wilkins*, from the 8th day of *December*, A. D. 1857, until the 8th day of *December*, A. D. 1858, which said sum of 90 dollars, so as aforesaid bargained for, exacted, reserved and received, exceeds the rate of 6 dollars for the use and forbearance of 100 dollars for one year, in a large sum, to-wit, 54 dollars, and is more than at that time was allowed by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Indiana*.”

*William P. Edson*,

“District Att'y Prosecutor.”



The defendant was tried and convicted upon this information.

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It is insisted that the information is bad. Defect in title is not ground of quashal. Ind. Pr. 43.

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The information is properly enough signed. The name of the proper officer is attached to it. The official name of that officer is district attorney; but, in duty, he is a prosecuting attorney. The statutes, in speaking of him, frequently confound his official title with that indicative of his duty. The term, district prosecuting attorney, combines both, but it is not important that either should be appended to the name of the officer when he signs an information. Both do no harm. The Court judicially knows its prosecuting officer.

There is a sufficient venue. Ind. Pr., p. 42, and pp. 168, 169, 170. The information is sufficiently certain as to the place where the usury was received. The information was filed in the name of the state of *Indiana*, in the Common Pleas Court of *Posey* county, *Indiana*, by *William P. Edson*, whom the Court officially knew to be the district attorney for the counties of *Posey* and *Gibson*, in *Indiana*, and charged the offense, in the conclusion of the information, to have been committed against the statutes and peace of *Indiana*; and in the body of the information, to have been committed in the said county of *Posey*, for which said *Edson* was district attorney. It appears to us that it was hardly possible for the defendant to mistake, or be in doubt about, the place where the offense was charged to have been committed.

The indictment is in the language, substantially, of the statute; and as, under our law, we are to look to the statute alone for the definition of offenses, it follows that, as a general rule, it will be sufficient in an indictment or information, to charge them in the language of the statute. Ind. Pr. *supra*. There are some exceptions to this rule; but it seems that an information for usury is not one of them; for an indictment for usury, in the language of the statute, was held good under former codes, where common-law rules governed. Ind. Dig. p. 380.

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LAIRD.

As an approximation to a test on this subject, perhaps it may be said that, where the statute defines the offense generally, and designates the particular acts constituting it, as, for example, the case of larceny, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally, without naming the particular acts constituting it, as if a statute makes it a crime to encourage a slave to run away from his master, without defining the act which should be deemed to constitute encouragement, it might be necessary to set out the acts done, that it might appear to the Court that they constituted the offense.

The evidence is not of record, and no question is raised, except upon the information; and as that is sufficient, the judgment must be affirmed with costs.

*Per Curiam.*—The judgment is affirmed with costs. Cause remanded, &c.

*A. P. Hovey*, for the appellant.

*W. P. Edson*, for the state.

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ASHLEY v. LAIRD and Another.

Suit upon a judgment recovered in a foreign state. The complaint was in the usual form, setting out a copy of the record of the judgment; but the record set out contained none of the pleadings in the cause, nor did it in any manner disclose what was the cause of action or the subject in controversy. *Held*, that the complaint was bad on demurrer.

Friday,  
June 1.

APPEAL from the *Howard* Circuit Court.

WORDEN, J.—Action by the appellees against the appellant, upon a judgment recovered by the plaintiffs against the defendant, in the District Court of *Polk* county, in the state of *Iowa*.

The complaint is in the usual form, setting out a copy of the record of the judgment. The record thus set out is evidently imperfect, as it contains none of the pleadings

in the cause (if any were filed), nor does it in any manner disclose what was the cause of action, or the subject of controversy. It begins with the usual entry, showing the impannelling of a jury, and the trial of the issue, and shows the return of a verdict for the plaintiffs for 125 dollars with costs, which is followed by judgment. The certificate of the clerk states that it is a "true copy of the judgment in the case," &c.

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LAIRD.

There was a demurrer filed to the complaint, which was overruled, and exception taken.

Answers were filed, and such proceedings were had as led to a judgment for the plaintiffs.

The ruling of the Court on the demurrer is assigned for error.

The record upon which the action was brought, with its authentication, constitutes a part of the pleading. *Westcott v. Brown*, 13 Ind. R. 83. Hence, the question as to the validity of the record is raised on the pleading.

Whatever presumptions may ordinarily be indulged in, as to the jurisdiction of the Courts of another state over the parties to an action, or the subject-matter of the suit, it appears to us that no such presumptions can make the record thus set out valid, so as to make it the foundation of an action. In order that the judgment of a Court may be valid, it must have jurisdiction not only of the parties, but also of the subject-matter. 1 Smith's Lead. Cas., 5th Am. ed., 821. *Vide*, also, 2 Am. Lead. Cas., 809.

There are several ways of acquiring jurisdiction over the parties, as by summons, notice, or the voluntary appearance of the parties; and where the record is silent upon this point, jurisdiction is sometimes presumed. *Vide Horner v. Doe*, 1 Ind. R. 130. So, also, where the subject-matter of the suit appears, and the Court rendering the judgment is one of general jurisdiction, it may, perhaps, be presumed that the Court had jurisdiction of the subject-matter thus appearing. But we know of no case holding that such presumption would attach where the subject of the adjudication does not appear.

If the judgment sued upon in this case was rendered

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without any cause of action, or in other words, if no subject-matter was brought before the Court for its adjudication, we regard the judgment as a nullity. If on the other hand, there was a subject-matter brought before the Court for its adjudication, either by complaint, declaration, or otherwise, such complaint, declaration, or other statement, becomes legitimately a part of the record, and is necessary to show that the Court was proceeding in the discharge of its judicial functions, in adjudicating upon the matter thus brought before it.

The certificate of the clerk, attached to the transcript of the record filed, implies that there might be other proceedings in the cause, as he only certifies that he has given a copy of the "judgment."

In whatever aspect the case may be viewed, we think the demurrer to the complaint was improperly overruled; hence, the judgment must be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*C. D. Murray* and *N. R. Lindsay*, for the appellant.

*R. Vaile* and *H. A. Brouse*, for the appellees.

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### SMITH and Another v. ROGERS and Others.

An assignment of a contract vests in the assignee all the rights, and imposes upon him all the burdens and conditions, to which the assignor was entitled or subjected under the contract.

*A.* contracted with *B.* for 25,000 bushels of corn. *B.* had contracted with *C.* for 15,000 bushels. *D.* had contracted with *C.* for 4,000 bushels. *A.* afterwards assigned his contract to *D.*, and guarantied the delivery of the 25,000 bushels. That contract contained a stipulation that the first corn received by *A.* from *C.* should be applied upon *B.*'s contract. *C.*, with notice of the assignment, delivered 12,757 bushels to *D.*, making no application of it to either contract. *D.* applied it, first, to his own contract with *C.* for 4,000 bushels, and the rest to *B.*'s contract with *C.* for 15,000 bushels. *Held*, in a suit by *D.* against *A.* upon the assignment and guaranty, that the 4,000 bushels applied by *D.* to his own contract with *C.* should have been applied upon *B.*'s contract.

The liability of a guarantor is measured by that of his principal, unless he expressly assumes a less or a greater liability.

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SMITH  
v.  
ROGERS.

APPEAL from the *Tippecanoe* Circuit Court.

DAVISON, J.—*Smith* and *Hunt*, who were the plaintiffs, sued the appellees, who were the defendants, upon the assignment and guaranty of a written contract. The contract is substantially as follows: Friday,  
June 1.

“*E. M. Weaver* has this day sold *Rogers, Reynolds* and *Martin*, 25,000 bushels of corn, deliverable on board canal-boats, at points on the canal between *Lafayette* and *Granville*, and at *Granville*, in quantities similar to those hereinafter written, during the season next after the date hereof, at 39 cents per bushel, making the whole amount 9,750 dollars. And it is agreed that the first corn received by *Rogers, Reynolds* and *Martin*, from *Andrew Scott*, shall apply to *Weaver's* contracts with him, until they are filled. *Lafayette, January 31, 1853.* [Signed,] *E. M. Weaver.*”

Annexed to this contract, there is a schedule of the amounts contracted for by *Weaver*, to be received from several different persons, at various points on the canal; among which was a lot of corn of 15,000 bushels, which *Weaver* had purchased of *Scott*, and which was to be taken at *Scott's* warehouse, at *Granville*. On the 16th of *May, 1853*, *Rogers, Reynolds* and *Martin* assigned the contracts to *Smith* and *Hunt*, the plaintiffs, “guaranteeing the delivery of the corn.” Plaintiffs, in their complaint, aver that although they were ready, &c., to receive the corn at the several points designated, &c., the defendants wholly failed to deliver, or cause to be delivered, a large portion thereof, viz., the 15,000 bushels specified in the schedule as deliverable at *Scott's* warehouse, &c.

Defendants answered. Their answer alleges that, after the assignment of the contract and the execution of the guaranty, viz., on the 16th day of *May, 1853*, and between that day and the first of *December* then next following, the plaintiffs received from *Andrew Scott* 15,000 bushels of corn, which was then and there applicable to, and was on

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account of, the consideration of said contract. Reply in denial of the answer. The issue was submitted to the Court, who found for the plaintiffs 1,122 dollars, and having refused a new trial, rendered judgment, &c. The plaintiffs appeal to this Court.

The evidence shows that *Smith* and *Hunt*, the plaintiffs, at the time they became the assignees of the *Weaver* contract, were the holders of a contract made by *Scott* to themselves, for the delivery of 4,000 bushels of corn, during the same season in which the corn on the *Weaver* contract was deliverable; but it was not shown that either *Weaver* or *Rogers, Reynolds* and *Martin*, had notice of the plaintiffs' contract with *Scott*; nor does it appear that any corn had been delivered on either contract, until after the defendants had executed the assignment and guaranty. The evidence further shows that *Scott*, who had full notice of the *Weaver* contract, and its assignment to the plaintiffs, in the years 1853 and 1854, delivered to them 12,757 bushels of corn, without applying the amount delivered to either contract, but leaving such application to the plaintiffs, who applied it first in discharge of their contract with *Scott* for the delivery of 4,000 bushels, and secondly to the discharge of the *Weaver* contract, assigned to them by the defendants. It also appears that the application thus made, produced a deficit in the delivery of corn by *Scott*, on the *Weaver* contract, of 6,048 bushels—the value of which the plaintiffs sought to recover, in this action against the defendants as guarantors. The Court, however, in its finding, applied the 4,000 bushels on the *Weaver* contract, thereby reducing the deficit to 2,048 bushels, which deficit, estimated at 50 cents per bushel, with interest from the 10th of *December*, 1853, makes the finding and judgment. Were the plaintiffs bound to apply the 4,000 bushels, delivered by *Scott*, to the assigned contract? This is the only question to settle in the case. As we have seen, that contract stipulates thus: "The first corn received by *Rogers, Reynolds* and *Martin*, from *Andrew Scott*, shall apply to *Weaver's* contracts with him, until they are filled." Had the same corn been delivered to the defendants before the

assignment and guaranty, it must have been conceded that they would have been bound to apply it to their contract with *Weaver*, even though they held a prior contract with *Scott* for a like number of bushels. And, as assumed by the appellees, the effect of this assignment was to vest in the plaintiffs all the rights, under the contract, which the defendants had as against *Weaver*—subject, however, to its burdens and conditions. 1 Pars. on Cont. 192, *et seq.*—1 Bac. Abr. tit. Assignment, 384.—2 *id.* tit. Covenant, 566.—*Mehaffy v. Share*, 2 Penn. R. 361. The plaintiffs then, in virtue of the assignment of the contract, were placed precisely in the same condition, in reference to the stipulation referred to, as that occupied by the defendants before the assignment. It is true, *Scott*, when he delivered the corn, failed to apply the several amounts which he delivered to the plaintiffs, to either contract; and the general rule is, “where the debtor fails to make application to a particular debt, the creditor is allowed to make it;” but this rule is not applicable to the case at bar, because here, the assigned contract held by the plaintiffs, directed how the application of the corn delivered by *Scott*, should be made. *Beach v. The State Bank*, 2 Ind. R. 488. It seems to follow that they, plaintiffs, as assignees, were bound to apply the first corn they received from *Scott*, to the *Weaver* contract.

But it is said in argument, that the guaranty upon which this suit was founded has no relation to the contract, so far as it stipulates for the delivery of the corn. We think otherwise. In general, the liability of the guarantor is measured by that of the principal, and will be so construed, unless a less or a greater liability is expressly assumed by the guarantor. 1 Pars. on Cont. 494.—Burge on Suretyship, 4. The guaranty before us, as we construe it, guaranties the delivery in accordance with the defendants’ contract with *Weaver*. It makes their liability simply co-extensive with his. As principal in the contract, he had a right to insist that the stipulation above quoted should be held effective against the plaintiffs, as assignees of the contract—that the first corn received by them from

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WHISLER.

*Scott*, should apply on the assigned contract—and it seems to us that the defendants, as guarantors, were entitled to the same application. We are of opinion that there is no error in the finding of the Court.

*Per Curiam*.—The judgment is affirmed.

*G. S. Orth* and *J. A. Stein*, for the appellants.

*H. W. Chase* and *J. A. Wilstach*, for the appellees.

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WALL v. WHISLER.

*A.* having recovered a judgment against *B.* upon which an execution was issued and returned *nulla bona*, filed an affidavit stating the recovery of the judgment and the issuing and return of the execution, and that *C.* was indebted to *A.* 155 dollars on note and mortgage. *C.* was summoned to answer, but *B.* was not made a party. *Held*, that this was error.

Friday,  
June 1.

APPEAL from the *Wabash* Court of Common Pleas.

WORDEN, J.—*Whisler*, having recovered a judgment against one *Lent*, in the Circuit Court of *Wabash* county, and having issued an execution thereon which was returned *nulla bona*, filed an affidavit stating the recovery of the judgment, and the issuing and return of the execution, and that the appellant, *Wall*, was indebted to *Lent* in the sum of 155 dollars on note and mortgage. *Wall* was summoned to answer, but *Lent* was not in any manner made a party to the proceedings. *Wall* appeared, and moved to set aside the complaint and dismiss the proceedings for the want of proper parties, but his motion was overruled and he excepted. *Wall* then answered, and such proceedings were had as led to an order by the Court that *Wall* pay the money into the hands of the clerk of the Court, there to await its further order. The proceedings were had under the provisions of sections 522 and those following, of the act concerning “proceedings supplementary to execution.” 2 R. S. p. 153.

We are of opinion that the order of the Court, in this



case, cannot be sustained. *Lent*, the judgment-debtor, was, in our opinion, an indispensable party to the proceedings, for two reasons if for no other: First, he had a right to show that the debt sought to be reached, together with other property, if any, claimed by him as exempt from execution, did not exceed the amount exempted by law from execution, and that he was entitled to claim it as exempt. Second, if the proceeding against *Wall* would be no bar to a suit by *Lent* against him for the same cause of action, *Lent* not being a party, he should be made a party in order that the proceeding should be final, and that *Wall* should not be placed in a situation that might require him to pay the debt twice. If the proceeding in the absence of *Lent* would be a bar to an action brought by *Lent* against *Wall* for the same cause of action, then *Lent* was a necessary party, in order that he might have a "day in Court," and be permitted to sustain the alleged claim against *Wall*. In either view, *Lent* was a necessary party in order to a proper and final determination of the matter in controversy.

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The 22d section of the code, provides that "The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court must cause them to be joined as proper parties."

We have seen that *Lent* was an indispensable party, in whose absence a complete determination of the controversy could not be had, and we think it was fatally erroneous to proceed to a determination in his absence.

*Per Curiam*.—The order of the Court below is reversed, and the cause remanded, with leave to the plaintiff to make *Lent* a party to the proceeding.

*J. U. Petitt* and *C. Cowgill*, for the appellant.

*J. M. Washburn*, for the appellee.

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1850.

McTAGGART and Another v. ROSE.

McTAGGART

v.  
ROSE.

In a suit to recover possession of personal property, an answer that defendant was and now is entitled to possession of the property, is bad, unless it set out the grounds of the right asserted.

Personal property may be conveyed even without a writing, if possession accompany the conveyance.

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The fact that the owner is indebted, or even insolvent, at the time of the conveyance, will not of itself invalidate the title, if no liens have attached.

So where possession was taken under a chattel mortgage.

A chattel mortgage is good as between the parties, though not recorded within ten days from its execution.

Friday,  
June 1.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Suit by *McTaggart* and *Clark* against *Rose*, to recover possession of personal property, and damages.

The defendant answered in three paragraphs—

1. By general denial.
2. Property in *Gulick* and *Tweed*.
3. As follows: "That at the time of the commencement of this suit, he, the defendant, was, and now is, entitled to the possession of all the personal property named in the complaint."

Reply in general denial.

Submission of the issues to the Court for trial. Judgment for the defendant.

The third paragraph of the answer was bad, in not setting out the grounds of the right to possession therein asserted. And we shall not inquire whether its defects were such as could be waived by pleading over to the merits without objection, as the final result in the cause would not be varied by any conclusion upon the inquiry.

These are the facts of the case:

On the 21st day of *August*, 1858, *Gulick* and *Tweed*, then the owners of the property in question, mortgaged it to *Woolf* and others, their indorsers, giving authority to them, in the mortgage, to take the property absolutely, and sell it for their indemnity, so soon as they should be called on to pay obligations on which they had become indorsers.

The mortgage was duly acknowledged. It was recorded on the 14th of *October*, 1858.

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In *January*, 1859, the mortgagees were compelled to pay notes indorsed by them, the mortgage became absolute, and the mortgagees took possession of the property, and sold it to *McTaggart* and *Clark*, the plaintiffs.

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v.  
ROSE.

On the 3d of *March*, 1859, judgments were rendered, before the mayor of *Indianapolis*, against *Gulick* and *Tweed*; and, on the fifth of that month, executions upon the judgments were placed in the hands of Marshal *Rose*, by virtue of which he seized the property, and acquired the title on which his claim to hold it is founded.

The question arising, therefore, upon which the case meritoriously must turn, is, had *Woolf*, and the other mortgagees, title whereby they were able, at the time of the sale to *McTaggart* and *Clark*, to make a valid conveyance of the property to them?

Title to personal property may be conveyed without a writing if possession accompany the conveyance. And the fact that the person is indebted at the time of the conveyance—is insolvent, even—if no liens have attached, will not, of itself, vitiate the title to the property he conveys. *Frank v. Peters*, 9 Ind. R. 343. If there had been no mortgage in the case, then, it would have been competent for *Gulick* and *Tweed*, in *January* or *February*, when their indorsers had been compelled to pay money for them, to deliver to them property in security for, or satisfaction of, the indebtedness thus accrued, no lien then existing upon the property.

But the mortgage, though not recorded in ten days from its execution, was valid as between the parties. Of this there can be no doubt. 1 R. S. p. 301, § 10. It, then, actually conveyed the title of the property to the mortgagees as against all persons but creditors of the mortgagors. But there is no evidence that they had any creditors, except the mortgagees themselves, in *January* or *February*. The title, then, at that time, when they sold the property to *McTaggart* and *Clark*, was good, so far as appears, under the mortgage, as against all the world. Nor, as we

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v.  
THE STATE.

have seen above, does the simple fact of the existence of creditors, if they have acquired no lien upon the property, disable the owner to make a *bona fide* conveyance of it. See Walk. Am. Law, 3d ed., 369.

It must follow, as a necessary consequence, from the fact that the mortgagors had a valid title at the time of the conveyance, that the purchasers took a good title as against all the world but creditors who had liens upon it at the time of sale. See, on this point, the numerous cases collected in 6 Am. Law Reg., p. 525. Counsel have also cited many cases in their briefs (1).

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. Wallace, B. Harrison, and N. B. Taylor*, for the appellants.

(1) The cases referred to are: *Kendall v. Sampson*, 12 Verm. R. 518; *Wilson v. Hooper*, *id.* 655; *Gill v. Griffith*, 2 Md. Ch. R. 270; *Boyle v. Rankin*, 22 Penn. St. R. 171; *Brown v. Webb*, 20 Ohio R. 389; *Swift v. Hart*, 12 Barb. 530; *Hudson v. Warner*, 2 Har. and Gill, 415; *Snyder v. Gee*, 4 Leigh, 535; *Lewis v. Adams*, 6 *id.* 320.

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### RANDOLPH v. THE STATE.

Indictment for receiving stolen goods, alleging absence from the state and concealment of the person so that process could not be served, &c., to avoid the limitation. The state was permitted to prove that there was a conspiracy, with which the defendant was connected, for the commission of this species of crime, and the jury was instructed to consider this evidence in connection with the concealment. *Held*, that this was error.

*Jones v. The State*, *ante*, 120, followed.

Friday,  
June 1.

APPEAL from the *Lagrange* Circuit Court.

DAVISON, J.—Prosecution for receiving stolen goods, commenced *January* 6, 1859.

The indictment charges that *George Randolph*, on the 28th of *October*, 1855, at, &c., one set of double harness,

of the value of 30 dollars, the personal goods of one *William Selby*, before then unlawfully and feloniously stolen, &c., feloniously did buy, receive, conceal, and have; he, the said *George*, then and there well knowing the said goods to have been feloniously stolen, &c. And that he, the said *George*, has been absent from the state, and has concealed the fact of the crime, and has so concealed himself that process could not be served upon him, for the space of two years since the commission of the offense.

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v.  
THE STATE.

The defendant moved to quash the indictment; but his motion was overruled, and he excepted.

Verdict against the defendant, upon which the Court, having refused a new trial, rendered judgment.

Upon the trial, the state propounded to one *Bevington*, a witness, this question: whether there was a conspiracy existing among certain persons for the purpose of committing this species of crime. He answered that there was such a conspiracy. The state then asked the same witness whether the defendant was connected with that conspiracy. To which he answered—*George* was connected with that conspiracy, he knew, because he was one of the main men. These answers were resisted by the defendant, but admitted by the Court, who, at the time, told the jury to consider them in relation to the concealment.

We have a statute which says: "If any person who has committed an offense, is absent from the state, or so conceals himself that process cannot be served upon him, or conceals the fact of the crime, the time of absence or concealment is not to be included in computing the period of limitation." 2 R. S. p. 363, § 13.

It would be difficult to perceive how the testimony admitted could, in any degree, tend to prove the concealment pointed out in the statute. Evidently, it was not pertinent to the charge that the defendant so concealed himself that process could not be served upon him. But the Court, by its instruction, intended to say that the answers of the witness should be considered by the jury in relation to the fact of the concealment of the crime. And this being the purpose for which the testimony was ad-

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v.  
LOWE.

mitted, its admission was, no doubt, erroneous; because there is, in point of law, no proper charge in the indictment to which the admitted testimony can be applied. True, the indictment alleges, generally, that defendant has concealed the fact of said crime; but this was insufficient—the particular acts done by him, whereby he produced such concealment, should have been alleged. See *Jones v. The State*, at the present term (1). And there being no proper averment to that effect, the testimony admitted was, in our opinion, irrelevant, and may have misled the jury.

The judgment must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*A. Ellison*, for the appellant.

*J. E. McDonald*, for the state.

(1) *Ante*, 120.

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### CROMWELL and Another v. LOWE.

It does not follow as a consequence of the recovery of damages for a nuisance, that the nuisance shall be abated.

And where the suit was for damages, with a prayer for abatement, it seems that a verdict for damages, with special answers to interrogatories never propounded, intended as a basis for an order for the abatement, was not invalid on account of such special findings; but would support a judgment for damages, and the specific relief prayed.

Where the plaintiff averred title in the premises injured by an alleged nuisance, and the defendant answered by a denial, and the plaintiff offered his title-deeds in proof of the issue, it was held that the Common Pleas was ousted of jurisdiction.

Friday,  
June 1.

APPEAL from the *Howard* Court of Common Pleas.

HANNA, J.—*Lowe* sued *Cromwell* for maintaining a dam across a certain stream below, and flowing the water back upon, lands of which he averred he was the owner and in possession, and that the same were greatly injured, and the

health of his family, also, injured and endangered by the maintaining, &c.; and praying for the recovery of damages, and that said dam might be abated as a nuisance.

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Answer in denial. Trial. General verdict for the plaintiff for 27 dollars, and, also, certain special findings in the form of answers to interrogatories; but no such questions appear in the record, nor does it appear that the Court was requested by either party to direct, or did direct, them to find specially upon any particular questions. Section 336, 2 R. S. p. 114. Judgment for the amount found by the jury, and also that the dam was a nuisance, and order that it be abated.

It is insisted that the special findings were unauthorized and erroneous, and could not be the foundation of the judgment which followed.

The first clause of the statute above cited, provides that, "In all actions, the jury, unless otherwise directed by the Court, may, in their discretion, render a general or special verdict." The special findings may have been intended by the jury, through abundant caution, to have been the basis for a judgment by the Court upon that part of the prayer of the complaint asking that the dam of the defendants might be abated, &c. Indeed it is contended by the defendants, that the general verdict was not sufficient to authorize an order abating, &c. If this position is correct (which we need not decide), then the jury might well return a special verdict as to that branch of the case; providing a general verdict could be returned as to a part, and a special verdict as to the balance, or other parts, of the case.

In the case at bar, the plaintiff sought to accomplish two objects; first, to recover for an alleged damage to his property, and also for injuries to himself and family, by obstructing the free use of that property; and secondly, to obtain an order for the removal of that which was alleged to be the cause of the injury complained of.

It does not follow as a consequence of the recovery of damages, that the subject of the action shall, therefore, be abated, any more than an order to abate should follow a

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conviction on a criminal prosecution for a nuisance. 2 R. S. p. 429.—See *Howard v. The State*, 6 Ind. R. 446. This being so, there were really two branches to the case—one for money damages, the other for specific relief. It was decided by this Court, in the case above cited, that it was discretionary with the Court whether the removal of the nuisance should be ordered upon the evidence adduced on the trial. So, in civil cases, we suppose the Court might or might not make the order. The special findings of the jury, directed to the determination of facts necessary to be considered in that behalf, could do no harm, if they were not conclusive upon the Court—a question which we need not now determine.

As the special verdict was thus properly returned, the first branch, or response thereof, brings to our consideration, in a form not to be disregarded, a question which ousted the Common Pleas of jurisdiction.

The complaint, among other things, averred that the plaintiff was the owner of the real estate described, &c. The answer was a denial. A bill of exceptions shows that the plaintiff, as a part of his evidence, introduced his title-deeds. The first instruction to the jury was, that the plaintiff must show, by a preponderance of evidence, that he was the owner of the land, &c. The first point upon which a special finding was returned was, that the plaintiff was the owner of the land described.

Perhaps it was not necessary for the plaintiff to have averred title, &c., in himself, for the purpose herein sought to be accomplished. 3 Stark. Ev. p. 988.—2 Greenl. § 470. But see *Laughlin v. The President, &c.*, 6 Ind. R. 223. But having made the averment, followed it up by proof offered on the issue made thereon, sought an instruction and obtained a verdict directed to that point, we are not at liberty, as the evidence is not all in the record, to decide otherwise than that it was an issue, in the case at bar, material to the plaintiff. The Common Pleas could not try such an issue. 2 R. S. p. 18, § 11.—*The President, &c.*, v. *Brinkmeyer*, 12 Ind. R. 351.—*Harvey v. Dakin*, *id.* 481.



*Per Curiam.*—The judgment is reversed with costs. May Term,  
Cause remanded, &c. 1860.

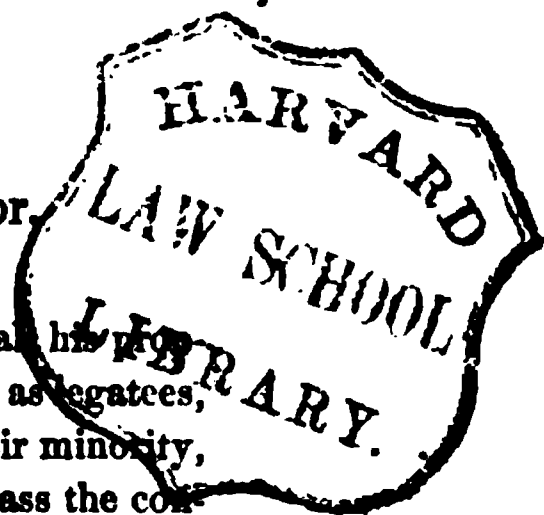
*J. H. Robinson* and *H. P. Biddle*, for the appellants.

*H. A. Brouse* and *R. Vaile*, for the appellee.

BRANCH  
v.  
HOLCRAFT.

BRANCH, Guardian v. HOLCRAFT, Executor.

Where a testator made his children residuary legatees, to whom all his prop-  
erty after the payment of debts and specific legacies, was to pass as legatees,  
not as heirs, giving his executor control of the property during their minority,  
it was held that § 137, 2 R. S. p. 280, did not apply so as to pass the con-  
trol of the property to the guardian.



APPEAL from the *Clinton* Court of Common Pleas. Friday,  
June 1.

HANNA, J.—One *Kirk* died testate. This is a contro-  
versy between the guardian of his minor children, and the  
executor of the will under which they are residuary lega-  
tees, as to the possession and management of the legacy  
due them under the said will, during their minority.

The petition of the guardian shows that the debts and  
specific legacies, and amount due the widow, have all been  
paid, the claims due the estate collected, &c.; that the  
assets amount to a large sum, consisting of cash notes and  
stock in a corporation; that the same is susceptible of dis-  
tribution, and avers that it would be to the benefit of the  
wards to invest the same in real estate, &c.

Section 137, 2 R. S. p. 280, is relied upon by the guar-  
dian, and so far as applicable to this case, is as follows:  
“Where the deceased shall have died intestate, the surplus  
remaining after the payment of all debts, and in case of a  
will, after the payment of all debts and legacies, shall be  
distributed to the legal heirs thereof, according to the law  
of descent in force in this state.”

The executor claims under the will, which provides  
first, for the payment of the debts of decedent; secondly,  
gives the widow, during her natural life, or her widowhood,

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the use of the personal property, and rents of the lands, &c., or so much as might be necessary for her support, &c., and that of the children named; thirdly, after the purposes aforesaid had been accomplished, the overplus, if any, was from time to time to be "disposed of as to the executors should seem best for the interest of my above-named children;" fourthly, it gave the executor power to sell lands, &c.; fifthly, "I further will and direct, that upon the death of my beloved wife, *Elizabeth*, or her marriage, that all my property, real and personal, shall be divided equally among my three children above named, so soon as they shall arrive at the age of twenty-one years; and if any of my said children should die before arriving at twenty-one years of age, or without issue, then their share is to be equally divided among the survivors of my children above named." The will then makes certain special bequests, and as to his other children, states, without naming them, that he had already advanced to them such sums as would make them equal, &c. The widow chose to take under the law, and was again married, as is shown.

We think that it is manifest from this will, that it was the intention of the testator to make his three children, who are the wards of the plaintiff, his residuary legatees, to whom all his property, after the payment of debts and specific legacies, was ultimately to pass as legatees and not as heirs, and therefore the section of the statute relied on is not applicable; for no overplus, after payment of legacies, &c., would remain to distribute. The management and control of that property was, by the will, given to the executor during the minority of such legatees, subject to the provisions of said will.

The demurrer to the petition was properly sustained.

*Per Curiam*.—The judgment is affirmed with costs.

*N. R. Lindsay*, for the appellant.

## IGOE v. THE STATE.

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THE STATE.14 239  
156 008

Section 56 of the act for the incorporation of insurance companies, &c., approved *June* 17, 1852, and the act of 1855 amendatory of that section, are void—the section not being embraced by the title of the act.

APPEAL from the *Marion* Court of Common Pleas.

*Saturday,*  
*June 2.*

DAVISON, J.—This was a prosecution against *Martin Igoe*, for violating an act entitled “An act to amend an act for the incorporation of insurance companies, defining their powers, and prescribing their duties, approved *June* 17, 1852.” This amendatory act is found in the Acts of 1855, p. 137, and contains these provisions:

“SEC. 1. It shall not be lawful for any agent of any insurance companies incorporated in any other state than the state of *Indiana*, directly or indirectly, to take risks or transact any business of insurance in this state, without first producing a certificate of authority from the auditor of state,” &c.

“SEC. 9. Any person violating the provisions of this act shall, upon conviction thereof before any Court of competent jurisdiction, be fined not exceeding 1,000 dollars, or imprisoned in the county jail not more than thirty days, or both, at the discretion of the Court.”

The information charges that defendant, as the agent of an insurance company incorporated by the laws of the state of *Pennsylvania*, took a risk (describing it) in this state without producing or procuring a certificate of authority from the auditor of state as prescribed by said act, thereby incurring the penalties of the aforesaid ninth section.

Defendant moved to quash the information; but the motion was overruled.

The cause was then submitted to the Court, who found the defendant guilty, and, having refused a new trial, rendered judgment, &c.

The amended act contains fifty-six sections. The first fifty-five sections relate to insurance companies incorpo-

May Term, 1860. rated under the laws of this state, define their powers, and prescribe their duties. The 56th section is as follows:

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THE STATE. "Every person who shall undertake to act as an insurance agent for any company not incorporated under the laws of this state, shall first deposit with the recorder of the county in which he proposes to establish his agency, an authenticated copy of a resolution of such company, authorizing any citizen or resident of *Indiana*, having a claim growing out of a contract of insurance made with such agent therein, to sue for the same in any Court of this state, and consenting that service of process on such agent shall have the same force and effect as if served upon the president and directors of such company; and he shall also file an authenticated copy of his commission or power of attorney, under which he claims to act as such agent, and any insurance made or procured to be made by such agent or person acting on behalf of any foreign insurance company, contrary to the provisions of this section, shall be void." 1 R. S. p. 331.

The point mainly relied on for the reversal of this judgment relates to the title of the amended act. The constitution declares that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in the act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title. Art. 4, § 19. The 56th section, which has been recited, is said to be inoperative, because its subject is not expressed in the title of the act. As we have seen, that title is in these words: "An act for the incorporation of insurance companies, defining their powers, and prescribing their duties." The reading of this title at once induces the conclusion that the various provisions of the act relate alone to companies to be incorporated within this state—in other words, to the incorporation, the powers, and the duties of domestic insurance companies, and nothing else. It follows that the title of the amended act does not express the subject of foreign insurance companies, as embraced in § 56, and

the result is that that section must be held a nullity, unless it is found to contain matter properly connected with the subject indicated in the title of the act. It is insisted that this section makes foreign insurance companies *quasi* state corporations, and thus properly connects them with the subject of the enactment. We think otherwise. The section confers no power upon foreign incorporated companies, but simply regulates the exercise by them of corporate powers within this state, conferred by the laws of a sister state. And this being the evident purpose of § 56, the matter which it contains is not, in any sense, connected with the subject expressed in the title of the amended act. We are of opinion that the section under consideration, as it stands in the act of 1852, is not within the requirements of the constitution, and, in consequence, the entire amendatory act of 1855, being, in effect, an amendment of § 56, is inoperative and void. *The State v. Bowers*, at the present term (1). See, also, *Wilson v. The State*, 7 Ind. R. 516, and *Mewherter v. Price*, 11 *id.* 201.

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*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*C. B. Smith, W. J. Smith, H. C. Newcomb, and J. S. Tarkington*, for the appellant.

(1) *Ante*, 195.

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### HALL v. RHODES.

APPEAL from the *Miami* Circuit Court.

Saturday,  
June 2.

*Per Curiam.*—The decision of this cause, in the Court below, turned exclusively on the weight of evidence. The evidence is all on the record—the jury impaneled in the cause have weighed it; and we can perceive no sufficient reason why their conclusion should be disturbed.

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The judgment is affirmed with costs.

*J. A. Beal*, for the appellant.

*N. O. Ross* and *R. P. Effinger*, for the appellee.

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127	201
14	240
125	203

### DOE on the demise of DUNN and Others v. HEARICK and Others.

A rightful title is not necessary to constitute an adverse possession such as will sustain the plea of the statute of limitations. Possession under claim or color of title is sufficient. The fact of possession and the *quo animo* it commenced, are the only tests.

Possession taken and continued in good faith, under an assertion of right and a claim of title believed to be good, may be adverse, though the claim of title be under a sale for taxes prior to which the land sold was not advertised.

When a purchaser of land from the *United States*, has made the final payment and is entitled to a patent, he is the equitable owner of the premises; and if an adverse possession be set up, the statute of limitations will run against such purchaser; for after becoming entitled to a patent, he might at any time obtain possession of the premises by a suit in equity.

Under the R. S. of 1824, the collector's conveyance of lands legally sold for taxes, invested the purchaser with an absolute estate in fee simple, even where the title of the delinquent tax-payer was simply an equitable one, derived from the *United States* by entry, the final payment of the purchase-money having been made, but the patent not having yet been issued.

The patent, in such case, when issued, inured to the benefit of the collector's grantee.

Saturday,  
June 2.

APPEAL from the *Switzerland* Circuit Court.

DAVISON, J.—Ejectment for the east half of the south-east quarter of section eleven, &c., in *Switzerland* county. The suit was instituted *November* 10, 1848, by the appellants. *Vienna Hearick* and others, who claimed title under one *James Hearick*, deceased, were the defendants.

The issues were submitted to the Court, who found for the defendants, and, having refused a new trial, rendered judgment, &c.

The record contains the following agreement of facts:

On the 19th of *May*, 1818, one *Samuel West*, of *Cincin-*

*nati, Ohio*, entered the south-east quarter of section eleven, in township two north, of range one west, in said county, containing one hundred and sixty-one acres, and paid 80 dollars, one-fourth of the purchase-money. After this, he accepted the provisions of the act of congress of *March*, 1821, giving further credit to the purchasers of public lands. The certificate of further credit granted under the provisions of the act, was afterwards assigned by him to *John H. Piatt*. This assignment was made between the 29th of *September*, 1821, the date of the certificate, and the death of *Piatt*, which occurred in *December*, 1822; and on the 12th of *April*, 1825, his heirs, by his administrator, accepted the provisions of the act of congress of *May*, 1824, relinquished the west half of said quarter section, applied the moneys which had been paid towards payment for the land in controversy in this suit, and also advanced a further sum in final payment for the same, and on the 10th of *December*, 1845, a patent therefor was issued to said heirs. It is admitted that the persons suing as lessors of the plaintiff, excepting *Isaac Dunn*, are the surviving heirs of *John H. Piatt*, and, further, that *Dunn* holds thirty acres of said east half, lying on the west end of it, which thirty acres, not being in the defendants' possession, are not in this controversy. In the year 1824, the land in suit was assessed for taxation for state and county purposes for that year, as non-resident lands. On the 8th of *June*, 1824, a precept was issued and delivered to the collector of said county, commanding him to collect such taxes, and on the 6th of *October*, the land was, by virtue of the precept, sold by him to one *Abner Clarkson*, who having paid the purchase-money, received a certificate of purchase, which, among other things, declared that he would be entitled to a deed on the 6th of *October*, 1826, unless the land should be redeemed by the owner before that time. *Clarkson*, on the 3d of *July*, 1828, assigned the certificate to *Arthur Humphreys*, who, on the 15th of the same month, assigned it to *Samuel McIntire*, who, on the 6th of *September*, then next following, assigned it to *Stephen* and *Frisby Hicks*. These assignments were all in due form. On the 10th of

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*November, 1828, Henry Banta, the then collector of taxes for Switzerland county, conveyed the land by deed in fee to Stephen and Frisby Hicks, and they, on the 30th of September, 1835, conveyed to James Hearick, under whom the defendants, as his widow and heirs, claimed title. McIntire, in virtue of his assigned certificate, took possession of the land in the summer of 1828, and Stephen and Frisby Hicks were in possession of it in the fall of that year, and during the same fall built a mill thereon. They continued to occupy the land until they sold to James Hearick, when he took possession and occupied it until his death; and from the time he died, up until the trial of this cause, it has been in the possession of the defendants. It was agreed that everything not admitted, so far as regards the sale of the land for taxes, is denied.*

These facts sufficiently prove that the defendants, and those under whom they claimed to have derived title, were in the continued and uninterrupted possession of the premises in contest for at least twenty years prior to the commencement of the present suit. Was that possession adverse? The land, as has been seen, was purchased from the *United States, May 16, 1818*. By an act of congress of *April 19, 1816*, it was taxable for state and county purposes, after the expiration of five years from the day of sale. U. S. Stat. at Large, p. 290, § 5. And was, consequently, liable to be taxed in 1824. In that year it was assessed, legally taxed, and, under a precept regularly issued, sold by the proper collector, who gave the purchaser a certificate of purchase. By this sale and certificate, it seems to us that he obtained at least a colorable title.

But it is argued that everything not admitted in the agreed case is denied, so far as regards the collector's sale; that the statute required the land to be advertised, and, as the record does not show that it was advertised, that fact was not admitted, but denied; and being thus denied and not proved, it must be intended that the land was sold without advertisement, and the result is, the collector's certificate and deed are void. In answer to this, it may be said that the statute under which the collector proceeded,



explicitly declares that his deed to the purchaser, or his assigns, shall be conclusive evidence that the sale was regular according to the provisions of the statute. R. S. 1824, p. 343. But suppose, as contended, that the deed is not conclusive, but mere *prima facie* evidence that the sale was regular, and that, in this instance, the collector, in the execution of the precept, had taken every step required of him by the law prescribing his duties; the defendants would, then, have the rightful title, and the statute of limitations would be inapplicable. Because to constitute an adverse possession such as will sustain the plea of the statute, a rightful title is not required. If there be a possession under a claim and color of title, it will be sufficient. Whenever this defense is set up, the idea of right is excluded. The fact of possession, and the *quo animo* it commenced, are the only tests. *Smith v. Burtis*, 9 Johns. 174.—*Jackson v. Newton*, 18 *id.* 355.—*Hearick v. Doe*, 4 Ind. R. 164.—Tillinghast's Adams on Eject., appendix, note A, p. 455, *et seq.*

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In this case, it was fully proved that the possession of *McIntire*, and also of *Stephen* and *Frisby Hicks*, was commenced in good faith, under an assertion of right, and a claim of title which they believed to be good. Possession thus taken and continued may, in our judgment, be held adverse, though the claim of title be under a sale for taxes, when, in point of fact, the land sold was not advertised prior to the sale. *Pillow v. Roberts*, 13 How. 472.—*Vancleave v. Millikin*, 13 Ind. R. 105.—Blackw. on Tax Titles, 665, *et seq.*

The appellants assume another ground. They say that the statute of limitations did not commence running until the 10th of *December*, 1845, the date of their patent, because until that date they could not legally assert their right of possession. No authority is cited in support of this position, nor do we know of any. The record shows that the plaintiff's lessors made final payment for the land in suit in *April*, 1825; and it must be intended that they were then entitled to a patent, and, for aught that appears in the record, could have obtained one, and thus have

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placed themselves in position to have asserted their rights, at a time when the statute would not have availed the defendants. After these lessors made final payment, and up until the patent was issued, they were, in equity, the owners of the premises. And there are authorities to the effect that the statute will run against the rightful owner of an equitable estate, where he has made no claim within the period of twenty years, and will constitute a bar to his recovery, if, during all that time, the possession has been held under a claim unequivocally adverse. *Elmendorf v. Taylor*, 10 Wheat. 168.—*Murphy v. Blair*, 12 Ind. R. 184.—Ang. on Limitations, 461. 'The lessors of the plaintiff having failed to redeem within the period stated in the collector's certificate of purchase, the statute of limitations, when possession was taken under that certificate, commenced running, and the rule is, when it once begins to run, it runs on, unless the party is restrained by some statute from pursuing his remedy. *Byrd v. Byrd*, 20 Miss. R. 144.—Tillinghast's Adams on Eject., p. 57, note 1.

If, indeed, the sale for taxes was irregular, so much so that the collector's deed conveyed no title, or if these lessors had redeemed the land within two years from the day of the tax sale, in either event, we perceive no reason why they, being the rightful owners of the equitable title, could not by suit in equity have obtained a decree giving them possession of the premises. It seems to us that they cannot be allowed to say that, until the date of their patent, they could not have legally asserted their right to possession.

Again, it is insisted that, though the forms of the statute were strictly pursued by the collector, the plaintiff is still entitled to recover; because, as the owners of the land held by entry, and not by patent or grant, the collector, when he sold it, sold an equitable title only, which is all the title his deed conveyed to the purchaser, and the title thus conveyed cannot, in this suit, be allowed to prevail against the legal title conveyed by the patent. This position, though plausible, does not seem to be conclusive. In view of the act of congress, to which we have referred, the state had a perfect right to authorize the assessment and

taxation of lands within her jurisdiction, and sold by the *United States*, after the lapse of five years from the date of the sale; and it seems to follow that she had the additional right to authorize the collection of such tax in the mode prescribed by her revenue laws. The revenue statutes in force when this assessment, sale, and deed were made, provide, *inter alia*, that all taxes upon real estate shall be a lien thereon until paid; and in case there is no goods or chattles out of which the tax on any tract of land can be made, the collector is required, by virtue of his precept, to seize the land so charged, and having given the proper notice of sale, to sell the land seized, or so much thereof as will pay the taxes charged thereon, and give the purchaser a certificate describing the land sold, specifying the amount paid therefor, and providing that, in case the owner or claimant shall not, within two years from the date of the certificate, pay the purchaser, his heirs or assigns, the sum therein mentioned, with interest, &c., the collector, or his successor, shall execute to such purchaser, his heirs or assigns, in the name of the state, a conveyance of the land, which shall vest in him an absolute estate in fee simple, and shall be conclusive evidence that the sale was regular, according to the provisions of the act. R. S. 1824, pp. 342, 343, 344. Now if these enactments were at all effective, and we think they were, the conveyance in this case by the collector, to *Stephen and Frisby Hicks*, invested them with an absolute estate in fee simple, and, in effect, divested the plaintiffs' lessors of all estate or interest in the premises. And the result is, the patent, when it was issued, inured to the benefit of the collector's grantee, and those claiming under him. This conclusion seems to accord with various well-considered decisions. In *Landis v. Brandt*, 10 How. U. S., it was held that a patent issued in 1845, to *Claymorgan* and his heirs, by which the heirs took the legal title, related back and inured to the protection of a title founded on a sheriff's sale of *Claymorgan's* equitable interest, made in 1808. So, in *French v. Spencer*, 21 *id.* 228, it was laid down as settled doctrine, that an entry in an *United States* land office, on which a patent

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issues, no matter how long after the entry is made, shall relate to the entry and take date with it. The fiction of relation is, that an intermediate, *bona fide* alienee of the incipient interest, may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a Court of equity could afford him. See, also, *Ross v. Barland*, 1 Pet. 655.

If, then, it be assumed that the sale, in this instance, was regular, according to the provisions of the act prescribing the duties of the collector, it follows that the patent issued to the lessees of the plaintiff related back to the date of the entry of the land at the *United States* land office, and inured to the protection of the defendants' title under the collector's deed, and that their title, thus protected, should prevail in this action. We are unanimously of opinion that the judgment should be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Sullivan*, for the appellant.

*D. Kelso*, for the appellees.

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WALCOTT v. PATTERSON and Others.

No exception having been taken in this case to any ruling of the Court below, no question is presented in the Supreme Court.

Saturday,  
June 2.

APPEAL from the *Allen* Circuit Court.

PERKINS, J.—In 1832, near twenty-eight years ago, *James Walcott* filed his bill in chancery, in the *Allen* Circuit Court, against *David Pickering* and *Isaac Patterson*, to foreclose a mortgage executed by them to him, to secure the payment of 200 dollars. The Hon. *Charles H. Test* was then the circuit judge. The solicitor by whom *Walcott* filed his bill was *David H. Colerick*, Esq.

The cause was continued for process till the *April* term, 1833, when the defendants appeared by *Henry Cooper*,

their solicitor in chancery, and answered. Hon. *Gustavus A. Everts* was then the circuit judge. The answer was sworn to before *Allen Hamilton*, clerk.

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The cause was continued, from term to term till the *April* term, 1838, when depositions were published. Hon. *Charles W. Ewing* was then the circuit judge.

In 1837, Mr. *Coombs* appears to have been associated with Mr. *Colerick*, as solicitor for the plaintiff.

At the *March* term, 1839, the cause was continued with leave to take depositions.

The next entry of record is at the *January* term, 1842, when the cause came up before the Hon. *James W. Borden*, circuit judge, and a bill of revivor was ordered against the heirs of defendant, *Pickering*, he having obeyed a summons to appear and answer at the bar of another and far distant Court.

At the spring term, 1842, the cause appears to have been submitted to the Court, and a decree seems to have been rendered for the plaintiff.

At the *July* term, 1843, the counsel for the plaintiff suggested the loss of the mortgage and note on which the suit was founded, and the Court ordered a copy of each to be substituted.

In 1849, there appears an entry that the papers were all lost; and, on motion of the plaintiff, the cause was reinstated upon the docket on a transcript of the lost papers.

At the *October* term, 1849, leave was given the plaintiff to amend his bill.

At the *March* term, 1850, the plaintiff obtained leave to file a new bill.

At the *December* term, 1850, an amended bill of revivor was filed. In this year, the name of *Robert Fleming* appears as clerk, and of *John G. Walpole* as a solicitor. *Franklin P. Randall*, Esq., had come into the cause at an earlier date, on the part of the defense.

At the *May* term, 1851, the heirs of *Lewis G. Thompson* applied to be admitted as defendants in the suit; and at the *August* term of that year, they were admitted. *Robert Brackenridge*, Esq., came in as their solicitor, and

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they were admitted under the administration of the Hon. *Elijah A. McMahan*, who had then ascended the circuit bench.

At the *March* term, 1855, the complainant obtained leave to amend his bill.

At the *May* term, 1855, being an adjourned term, the cause was submitted to the Court, and there was a finding and judgment for the plaintiff for 112 dollars, 18 cents, with costs in favor of the defendant.

The plaintiff moved for a new trial, which was overruled.

At the *February* term, 1855, a motion for a rehearing was denied, and an appeal to the Supreme Court was prayed and granted. It was submitted here in *May*, 1859.

The evidence is not upon the record; no exception was taken during the progress of the cause, and no question is presented here for decision.

It but remains, therefore, for this Court to affirm the judgment of the Circuit Court, and thereby send this not very important but still venerable cause, which has come down to us, through many accidents and much tribulation, from a former generation and a different system of judicial procedure, to its final resting place.

*Per Curiam*.—The judgment is affirmed with costs.

*D. H. Colerick*, for the appellant.

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YORK v. MARSHALL.

Saturday,  
June 2.

APPEAL from the *Franklin* Court of Common Pleas.

*Per Curiam*.—Suit by the appellee against the appellant for work and labor, &c. Verdict and judgment for the plaintiff for 195 dollars, 90 cents.

The only question raised in the case is whether the evidence is sufficient to sustain the verdict and judgment. After a careful examination of the testimony, we are of

opinion that it tends strongly to sustain the verdict, to say the least of it, and therefore that the judgment must be affirmed.

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v.  
AMES.

The judgment is affirmed with 5 per cent. damages and costs.

*G. Holland* and *C. C. Binkley*, for the appellant.

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FRANCIS v. AMES.

Where parties agree to a common-law arbitration, without fixing the time and place of rendering the award, notice of the award must be given to both parties. This having been done, a suit may be brought upon the award in any Court having jurisdiction.

Where parties agree to an arbitration under the statute, they must follow the statute, unless, in given particulars, they waive its requirements. The statute requires that a copy of the award shall be delivered to each party within a certain time. And where the agreement is that the award be made a rule of Court (naming the Court), as provided by the statute, it must be filed and enforced pursuant to the agreement.

Or a suit may be brought upon the bond of submission. This is a branch of the statutory remedy.

A suit pending may be referred to arbitration under a rule of Court; but as the statute makes no provision for this class of arbitrations, the proceedings must be regulated by the rule of reference, the agreement of the parties, or the common-law practice.

The three modes are cumulative remedies, and any of them may be adopted; but when adopted, it must be pursued unless a deviation be agreed to by both parties.

APPEAL from the *Laporte* Circuit Court.

Saturday,  
June 2.

PERKINS, J.—*Ames* sued *Francis* upon an award. The complaint set out the award and agreement of submission.

That agreement provided that the award should "be in writing, duly signed and executed by the arbitrators, and a true copy thereof delivered to the parties within and by the time allowed in § 11, p. 229, of the second volume of the revised statutes of this state; and the award be made a rule of the *Laporte* Circuit Court as provided by law,

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v.  
AMES.

and that judgment in said Court should be rendered thereon, to the end that all matters of controversy between the parties should be finally concluded."

The award appears to have been duly made, signed, and witnessed within the time; but it does not appear, nor is it averred in the complaint that a copy thereof was, in proper time, or ever, given to the defendant.

The defendant demurred to the complaint for insufficiency; the demurrer was overruled, and final judgment rendered for the plaintiff upon the award.

If the parties had, by their agreement of submission, limited the proceeding for the settlement of their controversy to a simple common-law arbitration, it would have been necessary, as the time and place of rendering the award therein were not fixed, to give notice of the award to both parties. Perk. Pr. 75. After that had been done, a suit upon the award could have been maintained in any Court having jurisdiction.

But the parties did not, by their agreement, thus limit the proceeding; they, on the contrary, expressly stipulated that the proceeding should be a statutory one. It was at their option to adopt a common-law or a statutory arbitration; but if they adopted a statutory arbitration, they were bound to follow the statute unless its requirements were waived in given particulars by both parties. No such waiver is shown. Hence, it was necessary that a copy of the award, in legal time, should have been given to the defendant below in this suit, and that the award should have been filed and enforced in the *Laporte* Circuit Court, pursuant to the agreement, and in the mode prescribed by the code. *Titus v. Scantling*, 4 Blackf. 89.—*The New Albany, &c., Railroad Co. v. McPheeters*, 12 Ind. R. 472. Or that suit should have been instituted upon the bond of submission. This is a branch of the statutory remedy. *Coats v. Kiger*, at this term (1).

In cases where a suit is pending, and it is agreed to refer it to arbitration, it may be so referred, under a rule of the Court; but for this class of arbitrations, the code of 1852 makes no provision, and the proceedings must be



regulated in it; when adopted, by the terms of the rule of reference, the agreement of the parties, or the common-law practice. Perk. Pr. 85, 87. See the practice stated in *Dickerson v. Hays*, 4 Blackf. 44. See, also, *Allen v. Hiller*, 8 Ind. R. 310.

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v.  
CASE.

In *Forqueron v. Van Meter*, 9 Ind. R. 270, the agreement of submission provided that the award should be made a rule of Court, unless a note should be given for the amount of the award; and the note was given.

The case of *Griggs v. Seely*, 8 Ind. R. 264, was one where a pending suit was referred, and in which, as we have seen, the statute prescribes no practice, and the parties both agreed to the mode of settlement adopted.

The three modes are cumulative remedies, and either one may be adopted; but when adopted, it must be pursued unless a deviation be agreed to by both parties.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. B. Niles*, for the appellant.

*J. A. Thornton*, for the appellee.

(1) *Ante*, 179.

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### WILLIAMS and Others v. CASE and Another.

APPEAL from the *Warren* Circuit Court.

Saturday,  
June 2.

*Per Curiam*.—Suit by the assignees upon the assignment of a note. Averment that one of the makers was insolvent, &c., and that judgment had been duly recovered and execution issued and returned no property found, &c., as to the other. Answer, first, general denial; secondly, that diligence had not been used against the makers, &c.

Upon the trial the proof was, that one of the makers was insolvent. The record of a judgment against the other, and the memorandum thereon of the justice that

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ARMSTRONG.

an execution had issued and been returned no property found, was given in evidence. The execution itself does not appear to have been introduced nor accounted for. It was the best evidence.

*Per Curiam.*—The judgment is reversed with costs, Cause remanded, &c.

*R. A. Chandler*, for the appellants.

*I. A. Rice* and *A. A. Rice*, for the appellees.

14	254
124	500
14	254
141	51

### TALBOTT and Others v. ARMSTRONG and Others.

A widow cannot claim dower in premises by virtue of the seizin of her husband, under a deed which, from the failure to have it recorded, became void, as against subsequent purchasers, and which, being unable to pay the purchase-money, he surrendered to the grantor, as a means of returning the land in discharge of the original consideration.

One good paragraph of an answer, in bar of the whole complaint, admitted by demurrer to be true, bars the action. Thus a judgment for the defendant over the general issue untried may be right.

A judgment for the plaintiff over the general issue untried, is error.

Saturday,  
June 2.

### APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—The widow and heirs of *A. G. Talbott*, senior, commenced an action to recover from one *Armstrong*, the possession of a certain parcel of land. Judgment for the defendant. In *October*, 1830, one *Dillard Drake*, then being the owner of the land in controversy, conveyed the same to said *A. G. Talbott*, senior, who entered into possession under his purchase, but did not get his deed recorded. Soon after the conveyance, it appears that the deed by which it was made, was again in the possession of *Drake*, the grantor, with his name torn off, and also the land which had been deeded; as it was soon after conveyed by *Drake* to one *Barker*, who entered into possession under his deed, which was duly recorded. And from that time there has been a continuous possession,

under a regular line of recorded conveyances, from *Barker* to *Armstrong*. May Term, 1860.

The question in the case is, can Mrs. *Talbott* claim dower in the premises, by virtue of the seizin of her husband, in 1830, under a deed which, from the failure to have it recorded, became void as against subsequent *bona fide* purchasers. TALBOTT  
V.  
ARMSTRONG.

If the husband died subsequently to the coming into force of the code of 1852, the dower right of the widow, if any she had, was abrogated by that statute. The rule in *Strong v. Clem*, 12 Ind. R. 37, would apply, in that event, to this case.

But if the husband died before the coming into force of that code, so that at that date the right of dower in the widow was vested, if any she had, it would be different. And as the record does not settle the point when the death of the husband occurred, we must examine whether the widow had any right, supposing the husband to have deceased before the 6th of *May*, 1853, the date of the taking effect of the code above mentioned.

It is admitted that the laches of *Talbott*, in failing to have his deed recorded, has barred his own, and the title of his heirs; but it is contended that they could not operate to bar the right of the widow. See 4 Kent, 37, *et seq.* It is difficult to see how the widow could enforce a claim, evidenced in no public manner, against a *bona fide* purchaser without notice, any better than could any other person; but waiving this point, we think the widow has failed to show a right to recover, in this case, upon another ground.

If her husband had not paid the purchase-money for the land, the grantor's lien for that was paramount to the right of dower; and if the husband, finding he could not pay for the land, surrendered his deed to the grantor, as a means of returning the land in discharge of the original consideration, the wife could claim no dower. Ind. Dig. p. 402.

In a case where the circumstances raise so strong a presumption against such payment as they do in this case,

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1860.

CARSON  
v.  
EARLYWINE.

and where interests of *bona fide* purchasers have attached, we think, at all events, before the widow can ask to have such interests disturbed, she should show all the facts necessary to make out her right in equity to recover.

As to the judgment for the defendant in this case, without a trial of the general issue, it was right. One good paragraph of an answer, in bar of the whole complaint, admitted by demurrer to be true, bars the action.

Had the judgment been for the plaintiff, over that issue untried, it would have been error.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Gavin* and *O. B. Hord*, for the appellants.

*J. S. Scobey*, for the appellees.

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CARSON v. EARLYWINE.

The award in this case (see the opinion) was not void for uncertainty.

There was no submission of, nor award upon, the title to real estate. See the submission and award in the opinion.

At common law, where the matter submitted to arbitration involved a mere question of damages, the submission might be by parol, by a simple writing, or by deed.

In a common-law arbitration, the award may be valid though not attested by a witness, and though copies of it are not furnished to the parties by the arbitrators. *Aliter*, in case of a statutory award.

All objections that could be successfully urged, either at law or in chancery, against an award, may now be made in a suit upon it.

Mistake of law was not one of those objections.

Saturday,  
June 2.

APPEAL from the *Shelby* Court of Common Pleas.

PERKINS, J.—*Earlywine* sued *Carson* upon an award, and recovered judgment.

The complaint set out the submission and award.

Submission:

“We, the undersigned, *Joseph Carson* and *Nathan Earlywine*, do agree to compromise a difficulty in reference to a deed for a parcel of ground in the town of *Boggstown*, and

to submit the damages, if there be any to said *Earlywine*, in not making a deed to *Earlywine*. Statements are to be made by the parties, to the committee of three disinterested men. These brethren, *Carson* and *Earlywine*, are to submit and be reconciled, as to all previous bad feeling, as christians and neighbors, and are not hereafter to bring this thing up, and are to strive to live together as brethren and neighbors. The committee are to decide the whole case, according to law, and evidence given at the time and place, and their decision is to be final.

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v.  
EARLYWINE.

November 5, 1854.

*Joseph E. Carson,*  
*Nathan Earlywine."*

Award—

"We, the undersigned committee, to whom is referred the case of *Nathan Earlywine* and *J. E. Carson*, for arbitration, after having heard the testimony, and duly considered the case, agree to award to *N. Earlywine* the 125 dollars, with interest, which said *Earlywine* paid said *Carson*, in good faith, to secure a title to the strip of ground" (here describing it), "for the following reasons, viz.: There being no law binding verbal contracts in landed property, further than the refunding back the money paid, with interest; and for the same reason, we award to said *Earlywine* the note given for 38 dollars, 75 cents, as given per last contract; and further decide that *Carson* have no recourse upon *Earlywine* for the *Carter* note, the same being lost by said *Carson's* negligence, according to law principles.

All of which we humbly submit as our decision as arbitrators in the above case.

*John P. Henderson,*  
*Wm. H. Fisher,*  
*James A. Graham."*

Upon demurrer, it was decided that this award was not void for uncertainty. We think the decision was correct. The only uncertainty appearing in it, is in the clause which relates to the *Carter* note. If there is such an uncertainty as renders that clause void (a point we do not decide), still, the part of the award on which the judgment in this cause rests is valid, as it is plainly within the sub-

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V.  
EARLYWINE.

mission, and does not appear to have any possible connection with the objectionable clause. See *McCullough v. McCullough*, 12 Ind. R. 487.—*Hays v. Miller*, *id.* 187.

It was also held, upon demurrer, that the award was not void because of its settling the question of title to real estate. Whether the award would have been void had it determined the question of such title, we need not decide; because, as a question of fact, there was no submission of, or award upon, title to real estate.

It was further held that the award was not invalid because the submission was not by deed. We know of no reason why the submission should have been by deed. This was purely a common-law arbitration, and we must look to the common law alone for the rules governing it. There is no statutory provision bearing upon it, and at common law, a submission might be by parol, by a simple writing, or by deed, where the matter submitted involved, as in this case, a mere question of damages. It was also ruled that the award might be valid, though not attested by a witness, and though copies of it were not “furnished to the parties by the said arbitrators.” These facts must appear in case of a statutory award, but not necessarily in case of an award at common law. See *Perk. Pr.* 74. The answer alleged misconduct and fraud on the part of the arbitrators.

At common law, under the former system of practice, such a defense was unavailable. To avail himself of such grounds of objection, the party was compelled to go into chancery. *Hough v. Beard*, 8 Blackf. 158. But beyond doubt, under our present practice, all objections that could be successfully urged, either at law or in chancery, against an award, may now be made in a suit upon it. Mistake of law did not constitute such an objection. But this topic need not be pursued, as no evidence in support of the allegations in the answer was offered on the trial, and the submission and award, which were not denied, but which were nevertheless proved, made out a *prima facie* case for the plaintiff. See *Allen v. Hiller*, 8 Ind. R. 310.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. Harrison*, for the appellant.

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1860.

O'DONALD  
v.  
THE EVANS-  
VILLE, &C.,  
RAILROAD CO.

O'DONALD v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

Where the name of the plaintiffs is such as might be probably adopted by a corporation, and the complaint does not show that they are not a corporation, they will be presumed to be a corporation with capacity to sue.

A defense setting up false representations, but not showing who made them, is bad.

A promissory note given for a conditional subscription of stock, is a waiver of the condition.

Such a note given some time after the date of the subscription, cannot be viewed as a part of the contract of subscription.

APPEAL from the *Greene* Circuit Court.

Saturday,  
June 2. 4

HANNA, J.—Suit by appellee against appellant, on a promissory note. Demurrer to complaint overruled. It is insisted that in this ruling there was error, because the complaint did not contain an averment that the plaintiffs were an incorporated company. The objection is not well taken. It did not appear on the face of the complaint that the plaintiffs were not a corporation, or had not capacity to sue, and for the purposes of the suit they should be intended to be a corporation, the name being such as might be probably adopted. 3 Harrison, 105.—1 Duer, 708.—*Richardson v. The St. Joseph Iron Company*, 5 Blackf. 146.—4 *id.* 267.

The defendant answered—

1. That the note did not belong, &c, to the plaintiffs.
2. That the consideration had failed, because the note was given in lieu of a conditional subscription of stock, &c.; that it was falsely, &c., represented to defendant, at the time the note was executed, that the condition had been complied with, &c.

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HAWORTH  
v.  
THE STATE.

Reply to the first, and demurrer sustained to the second, paragraph of the answer. Trial by the Court, and judgment for the plaintiffs.

Without inquiring any farther, it appears to us the second paragraph was not a good defense, because it did not show who made the false representations set up. It is not alleged that they were made by any person in a position to speak for the plaintiffs, nor that the defendant was thereby induced to execute said note. If he voluntarily executed the note, he would thereby waive the condition and become absolutely bound, unless the note and subscription are to be viewed as parts of but one contract. This, we think, could not be the correct view of the case at bar. The date of the subscription is not given, but enough is stated to show that it was before the execution of the note. The execution of the note may, therefore, be regarded as a waiver of the condition, for it is a promise to pay absolutely, and not upon a contingency, and being made sometime after the subscription, it cannot, in the form it is pleaded, be regarded as a part thereof. *Miller v. White*, 7 Blackf. 491.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*J. N. Evans*, for the appellant.

*W. Mack, H. C. Hill, D. McDonald* and *A. G. Porter*, for the appellees.

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#### HAWORTH v. THE STATE.

Saturday,  
June 2.

APPEAL from the *Howard* Court of Common Pleas.

*Per Curiam.*—This was a prosecution for retailing spirituous liquors, under the statute of 1853. Motion to quash the information overruled, and verdict and judgment against the defendant.



For reasons given in the case of *Meshmeier v. The State*, 11 Ind. R. 482, the judgment is reversed. May Term,  
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The judgment is reversed with costs. Cause remanded, MOSHER  
v.  
THE STATE.  
&c.

*H. A. Brouse* and *R. Vaile*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*,  
for the state.

### MOSHER v. THE STATE.

Whether an instrument is forged or not, is a question for the jury; and no proof of its forgery is necessary before it is offered as evidence.

*It seems* that the identity of papers taken upon the body of a prisoner may be sufficiently proved, without identifying any particular paper, by the officers taking and having them in charge.

The Supreme Court cannot determine whether such papers were proper evidence, or whether the admission of them as evidence injured the defendant, unless the papers are before the Court.

APPEAL from the *Vanderburgh* Circuit Court.

*Saturday,  
June 2.*

HANNA, J.—This was an indictment for forgery, and for uttering a forged instrument, &c.

Plea of not guilty, trial, and conviction.

Two points are presented—

1. That the Court erred in the admission of evidence.
2. That a new trial should have been granted.

The instrument alleged to have been forged, &c., was a draft purporting to have been drawn in *Louisville, Kentucky*, by *Thomas H. Hunt & Co.* on *A. D. Hunt & Co.*, in favor of *H. W. Mosher* or bearer.

The state introduced a witness, who testified that he was “acquainted with the signature of *Thomas H. Hunt & Co.*, having received a number of letters from them. The signature to this draft I should think was not genuine. I think it is forged.” After hearing this evidence, and over the objection of the defendant, who insisted that

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MOSHER  
v.  
THE STATE.

the forgery was not proved, and asked permission to cross-examine the witness to show he had no sufficient foundation for his judgment, the Court permitted the prosecutor to introduce the draft as testimony.

As to the last part of the objection, that is, arising out of the refusal to permit the cross-examination at that time, we do not think there is much force in it, under the circumstances, for the witness immediately proceeded to state at some length his means of knowledge in reference to the falsity of the signature; but stated that he was not acquainted with the members of the firm, and derived his information from letters received, &c. Whether the instrument was forged or not, was a question of fact for the jury, and, therefore, no preliminary proof of its forgery was necessary before it was offered as evidence. No objection appears to have been offered to the witness giving an opinion as to the genuineness of the instrument. Whether he had shown a sufficient knowledge to authorize him to give such an opinion, is a question, therefore, not before us. It does not arise on the motion for a new trial, because the evidence is not all in the record.

The state proved by the sheriff, that at the time of the arrest of the defendant, the "draft and some letters, and a mass of miscellaneous papers, were found upon his person." The witness was not able to identify any of the mass of papers, but thought they were the same—"those left on the table at the last term were the papers found on his person."

The clerk, in speaking of the same papers, testified that he "took them from the table at the last term of the Court, and they have been in my possession ever since." They were then admitted in evidence. The defendant objected, because they were not sufficiently proven to have been in possession of the defendant, nor were they legal testimony in the case.

Was the ruling right, and if not, what was the effect? The record does not show but that the ruling was right as to the question of identity. Whether they were proper evidence, we cannot determine, as they are not before us.

For the same reason, we cannot say that they injuriously affected the defendant.

May Term,  
1860.

The last point is, that a new trial should have been granted. Upon this, it is insisted that there is no evidence that a forgery had been committed in *Vanderburgh* county, nor was it a sufficient uttering, &c.

CLEM  
v.  
DURHAM.

As to the first point, there was no direct evidence; as to the second, *Earle* testified that the defendant offered a draft of the same amount and same parties, and of the same general appearance, at the counter of the *Crescent City Bank*, and asked witness if he would give the defendant the money on it, and was answered that he would if defendant would get some one to indorse for him. The name of Judge *Foster* was mentioned. The date or number of the draft not recollected. Witness could not state that this was the same.

*Foster* testified that defendant called on him and presented a check, and asked him to indorse it. Witness told defendant that he had no evidence that the signature was genuine—had doubts at the time. Defendant said he wanted the indorsement, so as to get the cash on it.

We think the evidence tends so strongly to sustain the verdict, as to prevent us, under repeated decisions, from interfering with that finding. 1 Bish. Cr. Law, § 185.

*Per Curiam*.—The judgment is affirmed with costs.

*J. J. Chandler* and *J. B. Hynes*, for the appellant.

*J. M. Shanklin* and *J. E. McDonald*, Attorney General, for the state.

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### CLEM v. DURHAM and Others.

By §§ 15 and 16, R. S. 1843, p. 666, if issues of fact were evolved in a proceeding in chancery in the Probate Court, either party could demand a trial of them by jury as a matter of right, and the Court was bound by the verdict unless it was set aside. The language of the statute, though in form merely permissive, is in fact peremptory.

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CLEM  
v.  
DURHAM.

Where upon the return of the verdict in such case, a motion was made to set i. aside and grant a new trial, the evidence adduced upon the trial not being before the judge, the motion was held to have been properly overruled.

If in framing an issue of fact for trial by jury, in a chancery proceeding, the plaintiff reply to the answer, he admits it to be good, and confines the inquiry to the truth of the matters at issue. Such pleadings are conducted subject to the same rules as other chancery pleadings.

Saturday,  
June 2.

ERROR to the *Vigo* Probate Court.

WORDEN, J.—Petition, or bill in chancery, for a partition amongst his heirs, of the real estate of *George Clem*, deceased. The bill was filed by *George Durham*, and his wife *Melinda* (formerly *Melinda Clem*), against the other heirs of the deceased, and *Mary Clem*, his widow. Dower was assigned to the widow, and partition decreed. *John Clem*, one of the defendants, prosecutes his writ of error. The proceedings were concluded whilst the old Probate Court was in existence, and the record was filed in this Court in 1852. There are alleged errors and irregularities in the proceedings, in permitting the complainants to amend their bill after having taken a decree by default as against the adult defendants, the infant defendants having answered by their guardian *ad litem*, and after commissioners had been appointed to make partition, who had made their report to the Court, which report had been accepted by the Court; and in then permitting any question to be raised as to advancements. We deem it entirely unnecessary, however, to pass upon any of these questions, as there is another involved which is decisive of the whole case. The bill, as amended and finally acted upon, charges that the plaintiff in error had been advanced by his father, in his lifetime, more than his share in the estate of the deceased, by the conveyance to him of certain real estate. *John*, in his answer, denied that the land mentioned was given him by way of advancement, but alleges that he paid the full value therefor.

The question of advancement was referred to a master, who reported adversely to the plaintiff in error, but as no action was had upon the report, and as the decree which

was finally passed was not based upon it, it need not be here further noticed.

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DURHAM.

The issue thus made by the allegations in the bill of an advancement to the plaintiff in error, and his denial thereof in the answer, was submitted to a jury for trial, and a verdict returned thereupon for the defendant, *John*. As the record is somewhat confused in respect to the question submitted to the jury, we here set out the order of the Court by which the question was ordered to be submitted to a jury. The record recites that "the complainants now here move the Court that an issue at law be awarded to try the question of advancement set up in complainant's bill, and denied in the answer of *John Clem*, which issue is ordered accordingly. \* \* \* And thereupon the said complainants allege that the said *John Clem* was advanced in manner and form as set forth in said complainants' bill, to the amount of 3,000 dollars, by, and in the lifetime of, the said *George Clem*, senior—which advancement and the amount thereof the said defendant, *John Clem*, denies; and thereupon it is ordered that the sheriff of our said county bring into Court, at the next term thereof, twelve good and lawful men of our said county to try the issue aforesaid," &c.

The record shows that the complainants afterwards filed a statement in writing of the alleged advancement, or, in the language of the record, "their issue or allegations for an issue in law." To this the plaintiff in error filed an answer setting up that the lands mentioned were conveyed to him by the deceased in consideration of 300 dollars, and of natural love and affection; and that after the death of the deceased, he fully accounted with his administrators for the full value of the lands thus conveyed to him, and paid them the residue of the full value thereof, a part thereof having been paid to the deceased in his lifetime, and that the administrators distributed the money so paid them by the said *John* among the heirs of said deceased, the present parties to this suit, who received the same with a knowledge of all the facts. The complainants replied

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DURHAM.

by way of denial, and "put themselves upon the country," and the respondents did "the like."

After the verdict was returned, the complainants moved to set it aside and grant a new trial of the issue, but the Court overruled their motion. It appears that when the issue was tried by the jury, the Hon. *A. Wilkins* was judge of the Court, and that he had gone out of office when the motion for a new trial was made. The complainants moved for a "rule" against Judge *Wilkins* that he furnish the Court now here his notes of the proceedings and evidence had before him on the trial, which was granted. The rule being served on Judge *Wilkins*, he returned that he had no minutes of the evidence and proceedings had before him on said trial, and had not sufficient recollection of the evidence to set the same out with certainty.

A bill of exceptions filed in the cause, shows that certain documents and depositions were read to the jury on the trial of the issue; but on the motion for a new trial, it did not appear "what facts were proved by parol, or otherwise, at the trial; nor had the present judge of this Court any knowledge of the evidence that was heard and understood before the jury, other than the record shows."

After the motion for a new trial was overruled, the cause was set down for a hearing, and the Court found, amongst other things, that said *John Clem* was advanced by the deceased in his lifetime, &c., and a decree was entered dividing the lands of the deceased amongst his other heirs, excepting *John*, who received nothing as heir to his father, but he received a portion as heir to a brother and sister, who died since the decease of his father.

This cause has once before been decided by this Court, but a rehearing was granted. In the former opinion of the Court, the following passage occurs:

"The Probate Court having submitted the question of advancement to a jury, and overruled the motion to set the verdict aside, had no power to pass upon the question of advancement. If that Court did not approve the verdict, it should have sustained the motion for a new trial.

Overruling that motion was an approval of the verdict; and the Court could not afterwards controvert the fact found by that verdict" (1).

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The question is discussed in the briefs of counsel, whether this is a proceeding at law or in chancery; for if it be a proceeding at law, the verdict is conclusive. The law in force when these proceedings were had, provided that lands might be divided "by writ of partition at common law, or by proceedings in chancery, or in the manner provided for in this article." R. S. 1843, p. 811.

Proceedings by petition under the statute, and by bill in chancery, were so similar, that it may not always have been easy to determine their character in this respect; but we are inclined to regard this as being a chancery proceeding, as distinguished from a proceeding at law. This being the case, the question again arises whether the Court could decree against the verdict of the jury without having first set it aside. The counsel for the defendants in error, in his brief filed on the rehearing, says: "The opinion assumes the position that the verdict of the jury, unless set aside, was conclusive. I take issue with this proposition, as a question of chancery practice. I understand the rule to be well settled, that the verdict upon an issue out of chancery is not conclusive, nor need it be set aside. But the Court may proceed to render a decree upon the merits, notwithstanding a verdict to the contrary."

There are authorities, undoubtedly, to the effect that the chancellor is at liberty, if he pleases, to treat the verdict as a mere nullity, and to decide against it, or to send it back to another jury. 3 Greenl. Ev. § 261, and authorities there cited. Whether this could be done in a cause where the chancellor was not apprised what evidence was introduced upon the trial of the issue, and therefore could not determine whether the verdict was in accordance with, or contrary to the evidence thus introduced, is, perhaps, not entirely clear from the authorities. Such a course is certainly not countenanced by the remarks of the Lord Chancellor in *Boote v. Blundell*, 19 Ves. 500. It was there said that "upon an issue directed, this Court reserves to itself the

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review of all that passes at law; and one principle on which the motion for a new trial is made here, and not to the Court of law, is, that this Court regards the judge's report with a view to determine whether the information collected before the jury, together with that which appears upon the record in this Court, is sufficient to enable it to proceed satisfactorily," &c.

But we need not determine what was the correct chancery practice in this respect, as the question under consideration was governed by statute. The following provisions are found in the act organizing the Probate Court. R. S. 1843, p. 666:

"SEC. 15. Whenever, in any suit or proceeding pending in a Probate Court in which the parties shall make an issue or issues of fact, or in which, according to the usages and practice of Courts of chancery, it may be proper that an issue or issues of fact, or a comprehensive note and entry thereof, be made, such Probate Court shall be authorized to order such issue or entry, when so made, to be docketed for trial at the term of the Court next after the docketing thereof, unless the parties can sooner be ready for the trial thereof.

"SEC. 16. Whenever any issue is pending proper to be tried by a jury, a venire for a jury shall issue by order of the Court, or may be issued by the clerk at the request of either party having the right to have the same tried by a jury."

The question arises whether under these provisions the parties could claim a trial of the issue by a jury, as a matter of right, or whether it was discretionary with the Court. If it could be claimed as a matter of right, it follows that the Court was bound by the verdict unless it was set aside. "It is obvious," says Mr. *Greenleaf* (3 *Greenl. Ev.* § 262), "that this power in the chancellor to disregard the finding of the jury cannot exist in any of the *United States* where the trial of facts, in cases in equity, is secured to the parties by constitutional or statute law, as a matter of right. The law, in granting such right, where it is seasonably asserted by a party, takes away from the chancellor the



authority to determine any question of fact material to the decision, and refers it exclusively to the jury; the judge retaining only the power to apply the law of equity to the facts found by the jury, in the same manner and to the same extent as at common law. It is only where no such right of the party is recognized by law, and where the resort to a jury is left to the discretion of the judge, in aid of his own judgment, that he is at liberty to disregard the finding of the jury, or to determine the facts for himself."

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Here was an issue of fact on a question of advancement, eminently proper to be left to the determination of a jury. *Shaw v. Kent*, 11 Ind. R. 80. It was a case, in the language of the statute above quoted, "in which, according to the usages and practice of Courts of chancery, it may be proper that an issue or issues of fact, or a comprehensive note and entry thereof be made."

In reference to the question whether the parties could claim a trial of the issue by a jury, as a matter of right, the 266th section of the work on evidence above cited, may be quoted. The author says (having previously noticed some constitutional and statutory provisions respecting a trial by jury): "In view of these express declarations respecting the great value of the trial by jury, and of the sacredness of the right, and the care taken for its preservation, no one will deny that it is a mode of trial highly favored, and intimately connected with the general welfare. And, therefore, it may deserve to be considered whether, in those states where Courts of equity are 'authorized and empowered,' or 'permitted,' to direct issues to the jury for the trial of material facts, it be not their duty to do so, and whether the parties may not demand it of right; unless, perhaps, in those cases where the statute expressly leaves it in the discretion of the Court; it being the well known rule of law, that words of permission in a statute, if tending to promote the public benefit, or involving the rights of third persons, are always held to be compulsory. Such permission and authority to direct a trial by jury, 'if there be an issue as to matter of fact, which shall render the intervention of a jury necessary,' is found in the statute of

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*Arkansas*, and is copied in nearly the same words in that of *Wisconsin*. In *Alabama*, the Courts, sitting in chancery, 'may direct an issue of fact to be tried whenever they judge it necessary.' In *Virginia*, 'any Court wherein a chancery case is pending, may direct an issue to be tried in such Court, or in any circuit, county, or corporation Court.' The precise construction of these provisions, and whether they would justify the Court in refusing to grant a trial of material facts by jury, when claimed by the parties, yet remains to be settled. Probably few judges, at the present day, in any state where the law is not perfectly clear against it, would venture to deny such an application in a case proper for a jury, nor to disregard the verdict if fairly rendered upon a legal trial. And in proportion to the duty in directing an issue to the jury, is the obligation on the judge to be governed by their verdict."

It is clear to our minds that the statutory provisions above quoted, authorizing the Probate Court "to order such issues or entry when so made, to be docketed for trial" by jury, are imperative on the Court, and confer upon the parties the right to such jury trial.

Authorities illustrating this point are abundant, and a few may be cited.

In Sedgwick on Statutory and Constitutional Law, p. 438, it is said that "this subject has been recently much considered in *England*, on the true construction of the act called the County Courts Extension Act, which declares that in certain cases 'a judge at chambers *may*, by rule or order, direct that the plaintiff shall recover his costs.' The word *may* was here held not to be discretionary, but to mean *shall*, and the Court said that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority, when the case arises and its exercise is duly applied for by a party interested and having a right to make the application; that the word *may* is not used to give a discretion, but to confer a power upon the Court and judges; and the exercise of such power depends not upon

the discretion of the Court or judge, but upon the proof of the particular case out of which their power arises.”

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In *The Mayor, &c., of New York v. Furze*, 3 Hill, 612, the Court say: “The inference to be deduced from the various cases on this subject, seems to be that where a public body or officer has been clothed by statute with power to do an act which concerns the public interests, or the rights of third persons, the exercise of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory.”

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So in *Witter v. Taylor*, 7 Ind. R. 110, it was held that a statute, providing that for certain causes the Court *may* change the venue of a cause, was imperative, and gave a party a right to such change, upon bringing himself within the requirements of the statute.

If the question were otherwise doubtful, it is rendered entirely clear by the consideration of the fact that the sections quoted providing for trials in the Probate Court, are the only ones providing for a trial in that Court by a jury either in chancery or common-law causes. The language employed has equal application to the trial of common-law and chancery causes. If the statute is not obligatory upon the Court, in reference to chancery causes, then it is not in reference to common-law causes. If, by the terms of the statute, the parties cannot claim, as a matter of right, a jury trial in the one case, they cannot in the other. So far as the point under consideration is concerned, the legislature placed the trial of common-law and chancery causes in the Probate Court upon the same ground, and it is not to be supposed that they intended, in view of the constitutional right of trial by jury in common-law causes, to leave it discretionary with the Court to grant or refuse a jury trial in such cases.

From these considerations, we think it clear that the parties were entitled, as a matter of right, to have the issue tried by a jury, and that the Court had no right to disregard the verdict unless it was set aside.

The Court below committed no error in overruling the motion for a new trial, as the evidence adduced upon the

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trial was not before the judge deciding the motion, and he, of course, had not the means of knowing whether or not the verdict was sustained by the evidence. The presumption is in favor of the verdict.

But the counsel for the defendant in error says that "the verdict was rightly disregarded, if for no other reason, because of the form of the issue. Instead of denying the advancement, which would have presented a plain issue, the defendant, to obtain an advantage before the jury, undertakes to admit the advancement, and to avoid it by alleging that he had repaid the money to the administrators."

This brings us back to the point in reference to which we observed that there was some confusion in the record. By the pleadings in the cause, the advancement was properly alleged on the one side and denied on the other. The entry upon the record, of the question to be tried, which seems to be a sufficient "comprehensive note" within the meaning of the statute, sufficiently alleges the advancement on the one side, and denies it on the other, and the Court award a venire for a jury to try the question. This, it would seem, presented the question to be tried, and upon which the jury passed. But supposing the papers afterwards filed by the parties evolved the question to be tried, and which was tried, we do not see how the case is in the least changed. These papers, if regarded as a part of the record, and as presenting the issue to be tried, must be considered as any other chancery pleadings. If the complainants were dissatisfied with the answer of *John*, setting up the accounting with, and payment to the administrators of the deceased, of the value of the land, and the distribution of the money amongst the parties to the suit, they should have excepted to it, and thereby, or in some other way, tested its sufficiency. But they filed their replication denying the matter set up. In the language of this Court, in the case of *Sampson v. Hendricks*, 8 Blackf. 288, "the effect of the replication was to admit the plea to be good, and to confine the inquiry to the truth of the matters at issue."

We think the decree should be reversed, and the proceedings subsequent to the return of the jury set aside, and that the land should be divided between the parties according to their respective shares, allowing *John Clem* his share as heir to his father, without any deduction for any supposed advancement to him by his father.

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*Per Curiam*.—The decree is reversed at the costs of the adult heirs of *George Clem*, deceased, parties hereto, other than the said *John*, and the cause remanded to the Court of Common Pleas of *Vigo* county, with instructions to proceed in accordance with this opinion.

*J. P. Usher*, for the appellant.

*S. B. Gookins*, for the appellees.

(1) This decision was rendered at the *November* term, 1857. The opinion and judgment of the Court were as follows:

STUART, J.—Petition for partition. The petition was filed by *Daniel Durham* and *Melinda*, his wife (formerly *Melinda Clem*), against the other heirs of *George Clem*, deceased, and *Mary Clem*, his widow. The dower was assigned, and partition decreed in accordance with the prayer of the petition.

*John Clem*, one of the defendants, prosecutes error.

The point of controversy is the question of advancement to *John Clem*. The record presents a sample of the imperfect character and irregularity of judicial proceedings under the old probate system.

It appears that upon the filing of the petition, process was issued and served on the defendants. On the calling of the cause, they were all, except *John Clem*, defaulted. The minors answered, however, by guardian *ad litem*, in the usual form. The Court thereupon find that the said *Mary Clem*, widow, is entitled to dower in the lands (describing them), and decree accordingly. It is further found by the Court that each of the heirs of *George Clem*, deceased, ten in number, is entitled to one-tenth part of the real estate described. In this finding by the Court, *John Clem* is named second in the order designating the heirs, and is adjudged to be entitled to one-tenth part of the realty. By a further order of the Court, three commissioners are named to make the assignment of dower and partition, according to their respective rights, and that they report, &c.

At a subsequent day, the commissioners appointed as above made their report, assigning the widow's dower by metes and bounds, and the several shares of the parties in like manner. The report appears regular and in due form, and, as the record shows, was accepted by the Court.

All this appears to have been done at the *April* term, A. D. 1847. Up to this point, there is no difficulty. But here the confusion in the proceedings commences.

The guardian *ad litem* for the minors came into Court and filed an affidavit, setting out that since his former answer, he had discovered that *John Clem* had been advanced in the lifetime of his father by the conveyance of a tract of

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land, the consideration expressed in the deed being 300 dollars and natural love and affection; and that he believed the land, or some part thereof, was given by way of advancement.

The question of advancement was thereupon referred to a master, and the proceedings continued till the next term, for the report of the master.

At the next term, counsel for *Durham* moved the Court to amend the entry of the last term, so as to show that the guardian *ad litem* had leave to file an additional and amended answer for the minor heirs. And without any notice to the defendants of such motion to amend the record, without making it as a *nunc pro tunc* entry, and without any consent of *John Clem*, the record is so amended and the answer filed. The amended answer is simply an amplification of the matter contained in the answer of the guardian *ad litem*, with the additional averment that the land deeded to *John Clem* by way of advancement, was, at the time, of the value of 800 dollars.

The interlocutory decree for dower and partition was made at the *April* term, 1847. The report of the master was made, and the record amended as above, at the *June* term of the same year. That report confirms the answer, viz., that in the land conveyed to him by his father, *John Clem* received an advancement of 500 dollars, being the difference between the expressed consideration and the actual value of the land.

Upon the report of the master in chancery coming in, the defendant, *John Clem*, by counsel, moved to set aside the amended answer of the guardian *ad litem*, for causes assigned in writing, which was overruled by the Court, and the ruling excepted to.

At the *January* term, 1848, *John Clem* moved the Court that judgment be entered then (*January*, 1848), as for the *April* term, 1847, on the finding of the Court upon the rights of the parties at the latter term. This motion was also overruled and excepted to.

Thereupon the Court, of its own motion, after reciting the judicial history of the cause, proceeds thus: "It is, therefore, now ordered and adjudged that the order of this Court made at the *April* term, 1847, and the report of the commissioners made at that term, except as to the assignment of dower, be and the same is hereby set aside: and the parties are ordered to appear before this Court, at the next term, with such evidence as may be advised."

This voluntary action of the Court, in reversing its own decisions of a former term, is also made part of the record by bill of exceptions.

It is needless to follow the action of the Court through all its phases in relation to this cause.

It appears that subsequently an issue on the question of advancement was made up and submitted to a jury, and that the verdict was in favor of *John Clem*, giving a negative to the advancement. Upon the return of this verdict, no motion for a new trial of the issue was interposed. There was simply an order of continuance till the next term. At the *October* term, 1849, certain depositions were ordered to be published. *John Clem*, protesting against any further evidence on the question of advancement, moved the Court to suppress all the depositions subsequent to the verdict, which was also overruled and excepted to.

At the *July* term, 1851, some two years after the verdict in *John Clem's* favor, [the plaintiffs] moved the Court to set aside the verdict, and for a new trial on the issue of advancement, which the Court overruled. A motion was

then made by the same parties, and sustained by the Court, for a rule on the former probate judge to furnish his notes of the proceedings and evidence had before him on the former trial.

It is not proposed to follow the mazes of this record any further. From the time of the acceptance of the commissioners' report, it is one continued series of errors—excepted to at every step.

Enough has already been seen to enable the Court to reach a clear, definite and equitable result.

We regard the record as it stands, after the report of the commissioners in April, 1847, and the approval of that report by the Probate Court, as conclusive of the rights of the parties. Taking the whole record up to that point together, it was in substance a decree upon the merits. The proper shares of the heirs were ascertained by the finding of the Court. Commissioners were duly appointed to set off these shares by metes and bounds. This was all that was necessary to complete the interlocutory decree already passed. It was determined by the consideration of the Court in chancery form, that the heirs were entitled to one-tenth each of their father's estate. This done, the decree was completed by the return of the commissioners' report, and its approval by the Probate Court. The language used in the proceedings, taken in its grammatical connection, and with reference to the posture of the question before the Court, cannot be regarded as less than a decree of affirmance and confirmation of the partition.

If we had any doubt as to the sufficiency of the language used, the subsequent motion, in January, 1848, comes in aid. That motion should have been sustained, and the proper decree entered *nunc pro tunc*. On the hypothesis that a decree *pro forma* had not already been entered, *John Clem* was clearly entitled to have it done; and it was error to overrule his motion to that effect.

The equity of the case is supported very strongly by the jury, on the isolated issue of advancement.

But we lay no stress upon that. The whole proceedings, subsequent to the approval of the commissioners' report, are wholly irregular and void. The proposition that Courts cannot, upon their own motion, or at the instance of parties, change, alter, or set aside at one term, their own records and proceedings of a previous term, does not need to be argued. *West v. Noaks*, 6 Blackf. 335.

Had the subsequent proceedings, irregular as they were, led to any satisfactory result, there might have been some inducement to regard them with indulgence. But it is idle to attempt to make anything out of proceedings which lead only to greater confusion at every step. For instance, after the verdict of the jury and two motions for a new trial overruled, the Probate Court then takes the bill, answers, pleadings, depositions, exhibits, verdict of the jury, and affidavits into consideration, and in the face of that verdict, finds that *John Clem* was advanced by eighty acres of land, describing it. The Court then proceeds to divide, in fancy, the whole estate of *Clem*, deceased, into 880 parts, and to divide that into shares among the other nine *Clem* heirs, or their descendants, excluding *John Clem*, and actually decreed accordingly.

Two things are sufficient to vitiate these proceedings, aside from anything else.

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1. The Probate Court had no power, at a subsequent term, to set aside their own proceedings of a prior term.

2. The Probate Court, having submitted the question of advancement to a jury, and overruled the motion to set that verdict aside, had no power to again pass upon the question of advancement. If that Court did not approve the verdict, it should have sustained the motion for a new trial. Overruling that motion was an approval of the verdict; and the Court could not afterwards controvert the fact found by that verdict.

In addition to all this, the motion for a new trial came too late, and the verdict of the jury became part of the record, beyond the reach of the Court, long before the motion for a new trial was made.

Altogether, it is a record which worthily commemorates the old Probate Court, now happily passed away.

In such a case, we can only do as we did in the case of *Boyd v. Doty*, 8 Ind. B. 370—go back through this mass of error and irregularity, to some safe starting point. In the case cited, we went back to the report of the commissioners making partition, making that the basis to correct the errors that had intervened. Here, as there, the report is sufficiently certain, because it can be made so by survey.

*Per Curiam.*—The decree is reversed, and this cause is remanded to the Common Pleas of *Vigo* county, with instructions to enter a decree confirming the report of the commissioners, made in *April*, 1847, and to make such further orders in the premises as may be necessary to perfect the partition; and that the adult heirs of *George Clem*, deceased, pay the costs, &c.

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### ROOKER and Another v. WISE, Administrator.

Where the record does not properly contain the evidence, the Supreme Court cannot determine whether there was a variance between the note sued on and that produced in evidence.

If the record does not show any amendment of the pleadings, it will be presumed that an amendment assigned for error was correctly made.

Where the record contains no replication, it cannot be assigned for error that the Court permitted a replication to be filed after trial and judgment.

Proceedings to try the question of suretyship do not affect the proceedings of the plaintiff.

The judgment rendered against a surety is the same as against his principal.

If a surety does not apply for an order directing the sheriff to levy upon and exhaust the property of the principal first, &c., as provided by statute, he cannot complain on appeal that an execution might be issued against him as a principal.



APPEAL from the *Hamilton* Court of Common Pleas. May Term, 1860.

WORDEN, J.—Suit by *Wise*, as administrator, against *Rooker* and *Eller*, on a note made by them to the plaintiff's intestate. Answer by the defendants, that they are not indebted to the plaintiff, as alleged in the complaint; and by *Eller*, that he is surety only upon the note. Trial by the Court. Finding and judgment for the plaintiff.

ROOKER  
v.  
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Saturday,  
June 2.

The following are the errors assigned:

1. There is a fatal variance between the note introduced in evidence, and the one sued on in the complaint.
2. In permitting the plaintiff below to amend the complaint, after all the evidence was heard.
3. In suffering the plaintiff below to file a replication after the trial was over, and after judgment was rendered.
4. In rendering a judgment in the face of the statute, and such as the pleadings would not authorize.

The evidence not being set out, we cannot say whether there was any variance between the note introduced and the one declared upon. The clerk, to be sure, copies a note into the transcript, and says it was offered in evidence, but that does not make it a part of the record.

The record does not show what amendment the Court permitted to be made to the complaint, and as amendments may be made in certain cases, we must presume that it was correctly permitted. See sections 94, 95 and 99 of the code.

The record does not show that the Court permitted a replication to be filed after trial and judgment. On the contrary, no replication appears in the record. It is stated that the plaintiff filed a replication, but this was before trial. No replication, however, was set out; nor is there any order of the Court permitting one to be filed.

The point made by the last assignment of error is, that, as there was an answer by *Eller*, setting up that he was surety only on the note, which was not replied to, judgment should have been rendered against him accordingly.

Whether the answer by *Eller*, setting up that he was surety only, can be deemed a written complaint, within the meaning of § 674, p. 186, of the code, we need not de-

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termine, as proceedings to try the question of suretyship do "not affect the proceedings of the plaintiff." The judgment is rendered precisely the same against sureties as principals. If the finding be that one is surety only, "the Court shall make an order directing the sheriff to levy the execution first upon, and exhaust, the property of the principal, before a levy shall be made upon the property of the surety; and the clerk shall indorse a memorandum of the order on the execution." Sec. 675.

*Eller* did not apply for any such order. The judgment against him is entirely proper and correct.

*Per Curiam*.—The judgment is affirmed with 6 per cent. damages and costs.

*D. C. Chipman*, for the appellants.

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MILLS and Another v. GOULD and Another.

The taking of collaterals to secure the payment of a promissory note, does not bar a suit upon it.

Saturday,  
June 2.

APPEAL from the *Porter* Court of Common Pleas.

*Per Curiam*.—Suit by the appellants against the appellees, on a note for 316 dollars.

The defense relied upon was, that the plaintiffs had received from the defendants notes and accounts to the amount of the note sued on, as collateral security for the payment thereof, a part of which had been collected, and all of which might have been collected by the exercise of reasonable diligence—none of which notes and accounts had been returned or tendered to the defendants.

The cause was tried by the Court, who found for the defendants, and rendered judgment, over a motion by the plaintiffs for a new trial.

On the trial, the plaintiffs gave in evidence the note sued on, and the defendants gave in evidence the following receipt, given by the plaintiffs to the defendants, viz.:

“Received of *Gould and Cross*, 170 dollars, 82 cents’ worth of accounts, and 129 dollars’ worth of notes, as collateral security, to be collected at the costs of *Gould and Cross*. *Valparaiso, December 30, 1855. Mills & Co.*”

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It was proved that one of the notes mentioned in the receipt could not have been collected at any time since the date of the receipt. It was proved that the plaintiffs had collected of the notes and accounts 266 dollars, 30 cents, the collection of which was worth 19 dollars, 97 cents. This was all the evidence. On the trial the defendants’ attorney demanded of the plaintiffs’ attorney “the production of the balance of the notes mentioned in the receipt, without giving any notice of the demand, or asking any order of the Court in reference to the notes.”

This evidence does not sustain the defense. The amount shown to have been collected on the collaterals, deducting costs of collecting, fell considerably short of the amount due upon the note sued upon. Nor does it appear that the balance of the collaterals could have been collected, or that the defendants suffered any injury in consequence of any neglect of the plaintiffs to exercise due diligence in making collections. The taking of the collaterals did not bar a suit upon the note. *Dugan v. Sprague*, 2 Ind. R. 600, and authorities there cited.

The demand made by the defendants’ attorney, of the production of the balance of the notes, raises no question for our consideration. No order of the Court was asked, and we are not advised of the object of the demand.

The motion for a new trial, in our opinion, should have prevailed.

The judgment is reversed with costs. Cause remanded, &c.

*S. J. Anthony and J. B. Niles*, for the appellants.

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THE STATE *v.* GARTRELL.

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An affidavit charging a person with living in open and notorious adultery or fornication, must allege a *living together*. Occasional illicit intercourse between the defendant and the woman named, is not sufficient ground for the charge.

If the affidavit is bad, the information, though otherwise sufficient, will be quashed.

Saturday,  
June 2.

APPEAL from the *Warren* Court of Common Pleas.

WORDEN, J.—Information against the appellee, for living in open and notorious adultery. On motion of the defendant, the information was quashed, and the state excepted. The affidavit on which the information was predicated, charges that on the 24th day of *October*, A. D. 1857, at said county, the defendant, “a married man, did commit and live in open and notorious adultery with *Emma Dawson*, by then and there having carnal knowledge of the said *Emma*,” &c. The statute on which the information is based, provides that “every person who shall live in open and notorious adultery or fornication, shall be fined,” &c. 2 R. S. p. 433.

Under a similar statute of 1838, it was held that, in order to make out the offense, there must be a “living together,” and that occasional illicit intercourse between the defendant and the woman named, is not sufficient to make out the offense. The Court remark that “the offense consists in open and notorious cohabitation, and unless it be of that character, it is not indictable.” *Wright v. The State*, 5 Blackf. 358.

With this exposition of the statute before us, it seems that the affidavit is wholly insufficient. It charges that the defendant “did commit and live in open and notorious adultery with” the woman. Had it stopped there, it would probably have been sufficient. But it goes on to explain how it was done, viz., “by then and there having carnal knowledge of her.” It amounts to nothing more, taken all together, than a charge that, at the time and place named, the defendant committed adultery with the woman.

This, we have seen, does not come within the provisions of the statute. Were the affiant indicted for perjury on this affidavit, it seems to us that he could not be convicted if he proved that the carnal intercourse took place as alleged, although it should appear that there was no living in open and notorious adultery; because by the latter branch of the affidavit he qualifies and explains what he means by the former.

May Term,  
1860.

HIATT  
v.  
DAVENPORT.

We have not examined whether the information is sufficient or is bad, as there must be a sufficient affidavit, otherwise the information may be correctly quashed. A defective affidavit is not cured by a sufficient information. *The State v. Downs*, 7 Ind. R. 237.—*The State v. Wise*, *id.* 645.

*Per Curiam*.—The judgment is affirmed.

*J. Parks*, for the state.

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### HIATT v. DAVENPORT.

APPEAL from the *Hamilton* Circuit Court.

Saturday,  
June 2.

*Per Curiam*.—Suit by *Davenport* against *Hiatt*. No question is raised on the pleadings. Trial by the Court, and finding for the plaintiff. A motion was made for a new trial, on the ground that the finding of the Court was contrary to law and evidence, and was overruled and judgment entered on the finding.

The evidence tends to sustain the finding, and as this is the only point properly before us, the judgment must be affirmed.

The judgment is affirmed with 1 per cent. damages and costs.

*G. H. Voss*, for the appellant.

*D. Moss* and *J. W. Evans*, for the appellee.

May Term,  
1860.

FRENCH v. VENNEMAN.

FRENCH  
v.  
VENNEMAN.

14	282
164	464

Action for criminal intercourse with *Eleanor*, the plaintiff's wife. Answer in denial, and propounding interrogatories, and among others this: "How often within the last five years did you carnally know any woman or girl, other than said *Eleanor*?" which was stricken out on motion. *Held*, that this was not error; that the plaintiff could not be compelled to answer, for the reason that his answer might expose or tend to expose him to a criminal prosecution under the statute against living in open and notorious adultery or fornication.

Monday,  
June 4.

APPEAL from the *Kosciusko* Circuit Court.

DAVISON, J.—The appellee, who was the plaintiff below, brought an action against *French*, charging him with having had, at divers times, criminal intercourse with one *Eleanor Venneman*, the plaintiff's wife.

The defendant answered the complaint by a general denial. With this answer he filed various interrogatories, propounded to the plaintiff, among which is the following: "How often, within the last five years, did you carnally know any woman or girl, other than the said *Eleanor*?"

Upon the filing of this interrogatory, the plaintiff moved to strike it from the files. The Court sustained the motion, and the defendant excepted.

The point involved in this ruling is the only one made in the appellant's brief; hence that alone will be noticed. See rule 28 of this Court.

The code provides that "either party may propound interrogatories, to be filed with the pleadings, relative to the matter in controversy, and require the opposite party to answer the same under oath." 2 R. S. p. 97, § 303. The defendant, no doubt, had a right to prove, in mitigation of damages, the profligate habits of the plaintiff, and his criminal connection with other women. 3 Phil. Ev., 6th Am. ed., 528. And the purpose of this interrogatory was to elicit such proof. But the inquiry arises, could the plaintiff have been compelled to answer the interrogatory? A witness cannot be compelled to answer any question the answering of which may expose or tend to expose him

to a criminal charge, or any kind of punishment. He is exempted by his privilege from answering not only what will criminate him directly, but also what has any tendency to criminate him. If the fact to which he is interrogated forms but one link in the chain of testimony which would convict him, he should not be required to answer. 2 Phil. Ev., 6th Am. ed., 929.—*Garvin v. Scammon*, 9 Fost. (N. H.) 280.—*Coburn v. Odell*, 10 *id.* 540. The law thus protects a witness, and there seems to be no reason why a party, when called on to answer interrogatories, should not be allowed the same degree of protection. Indeed, it has been decided, under a statute in effect the same as ours, that a party is not required to answer interrogatories, in case such answer would make him liable to a penalty or forfeiture, or tend thereto. *Thornton v. Adkins*, 19 Geo. R. 464.

May Term,  
1860.

FRENCH  
V.  
VENNEMAN.

We have a statutory crime thus defined: "Every person who shall live in open and notorious adultery or fornication, shall be fined," &c., "and imprisoned," &c. 2 R. S. p. 433, § 21. In this instance, the interrogatory assumes that the plaintiff had been guilty of adultery, an essential element in the crime, as defined by the statute, and requires him to state how often he had been so guilty within a given period. And had he answered, it seems to us that his answer might have tended to expose him to a criminal prosecution. At least it might have disclosed various acts of illicit intercourse with a woman, and so constitute a link in the chain of testimony necessary to convict him of the statutory crime of adultery. *Pickard v. Collins*, 23 Barb. 444.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*L. C. Jacoby*, for the appellant.

May Term,  
1860.

THE BOARD  
OF COMMISSIONERS, &C.

V.  
KIEROLF.

THE BOARD OF COMMISSIONERS OF MARTIN COUNTY and  
BROOKS v. KIEROLF and Others.

The county auditor is authorized by statute to make a special contract with the proprietor of a newspaper for the publication of the delinquent list; and the county board, in making an allowance for such publication, must be governed by the amount which the auditor has agreed to pay.

And if an appeal be taken, upon the affidavit of a person aggrieved by such allowance, it cannot be proved upon the trial that the list could have been published for an amount less than the allowance.

Monday,  
June 4.

APPEAL from the *Martin* Court of Common Pleas.

DAVISON, J.—This was a proceeding by the appellees before the county board, to obtain an allowance for publishing the delinquent list for the year 1856. The following is the cause of action:

“*December 5, 1857. County of Martin, to Kierolf, Shireliff, and Pfeiffer, debtor: To publishing in Weekly Comet, for four consecutive weeks, two hundred and seventy-three tracts of land, advertised for non-payment of taxes for 1856, at 75 cents per tract . . . . . \$202 75*”

Upon the filing of this claim, the board made an order whereby they allowed it.

After this, on the 10th of *December, 1857*, one *Thomas J. Brooks* filed an affidavit wherein he alleges that he is aggrieved at a decision made by the board of commissioners, making an allowance to *Kierolf, Shireliff, and Pfeiffer*, for 202 dollars, 75 cents, for publishing delinquent list for 1856, he being interested as a citizen and tax-payer of *Martin* county. And having executed the requisite bond, he took an appeal to the *Martin* Court of Common Pleas. In that Court, the plaintiffs moved to dismiss the appeal on the ground that the affidavit was insufficient; but their motion was overruled, and they excepted. The cause was then submitted to a jury, who found for the plaintiffs 202 dollars, 75 cents; and the Court having refused a new trial, rendered judgment, &c.

During the trial, the plaintiffs produced *Richard C. Stevens*, the auditor of *Martin* county, who, over the defend-



ants' objection, testified that he contracted with the plaintiffs for the printing of the delinquent list of said county for the year 1856; that the contract price was 75 cents per line, and that the number of lines contained in the list furnished by him to the plaintiffs would amount to 204 dollars; that there are embraced in the list several tracts of land, say ten to fifteen, which were not returned delinquent; but witness has agreed to pay the expense of advertising these tracts, as they were advertised through his mistake, and he was satisfied with the list as published.

May Term,  
1860.

THE BOARD  
OF COMMISSIONERS, &c.

V.  
KIEROLF.

*James Wilkins*, who was produced by the defendant, testified that he was a practical printer; that the list, as published in the *Comet*, is not done in a workmanlike manner; but is done as well as is generally done by country papers in this state, and is as well executed as could be done by plaintiffs' printing materials. Defendant then offered to prove by this witness, that a reasonable compensation for printing the list in question would not exceed 25 cents per line; but his offer was resisted by the plaintiffs, and refused by the Court, on the ground that a special contract between them and the auditor, as to the price of printing the list in the *Comet*, was proved to have been made.

The refusal of this offer raises the only question in the case.

By an act of 1852, the county auditor is required to make out a copy of the delinquent list in his county, and cause it to be published for four weeks successively, once in each week, in some newspaper having general circulation in his county, if any there be, or he may have the same printed in handbill form, if it can be done cheaper than to publish the same in a newspaper. 1 R. S. p. 137, §§ 142, 143.

These provisions seem to admit the construction indicated by the decision of the Common Pleas. The auditor, as has been seen, is required to publish the list in a newspaper, and this requirement, it seems to us, involves the power to settle the price of such publication by a special contract; otherwise it is difficult to perceive how the various provisions of the statute, in respect to the collec-

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1860.

CONWELL  
v.  
HILL.

tion of delinquent taxes, can be effectively carried out. These taxes, with the cost of advertising, may be paid at any time before the land advertised is sold. *Id.* p. 136, § 136. And how could the collecting officer know the entire amount due from the tax-payer, unless the amount to be paid for publishing the list is definitely fixed by contract? We know of no authority to make such contract, other than that involved in the duty of the auditor; and the result is, the county board, in making an allowance for such publication, must be governed by the amount which he has agreed to pay.

It follows that there is no error in the ruling of the Court, and the judgment will, therefore, be affirmed.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages, and costs against *Brooks*.

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CONWELL, PRESIDENT OF THE BANK OF CONNERSVILLE, v.  
HILL.

Monday,  
June 4.

APPEAL from the *Fayette* Circuit Court.

*Per Curiam.*—The judgment in this case is reversed, for the reasons given in a case between the same parties, at the present term, the questions arising in the record of each case being similar (1).

The judgment is reversed with costs. Cause remanded, &c.

*N. and G. Trusler and J. A. Fay*, for the appellant.

*J. S. Reid*, for the appellee.

(1) *Ante*, 131.

GARRISON v. THE STATE.

May Term,  
1860.

GARRISON  
v.  
THE STATE.

Prosecution for a nuisance in keeping a disorderly house wherein intoxicating liquors were sold, "by then and there, at divers times, permitting dissolute persons to drink, tittle, carouse, and swear, to the annoyance," &c. *Held*, that evidence of "shooting, yelling, and laughing," was admissible to sustain the charge.

The jury, in cases of nuisance, may look to the evidence of acts done, and the probable consequence of them, rather than to testimony of particular witnesses as to the effect such acts had upon them.

APPEAL from the *Wabash* Court of Common Pleas. *Monday, June 4.*

HANNA, J.—This was a prosecution for a nuisance in keeping a house in a disorderly manner, wherein intoxicating liquors were sold, by "then and there, at divers times, permitting dissolute persons to drink, tittle, carouse, and swear, to the annoyance," &c. Conviction.

Two points are presented—

1. Upon the admission of evidence.
2. That the evidence is insufficient, &c.

It is urged that the proof should have been confined strictly to the particular acts of disorder mentioned in the information; and that it was, therefore, error to permit, as the Court did, evidence of "shooting, yelling, and laughing," in support of the said charge.

The *English* practice is to admit, on the trial, evidence of particular facts, &c., although the averment may be general. Archb. Cr. Pl. and Pr., pp. 607, 608. Here is the general averment of the manner in which the house was kept, and, to a certain extent, a specification of the particular acts which constituted the disorder complained of. Should the proof have been confined to that specification? Whether the same rule of evidence should obtain under our practice, it is not strictly necessary that we should decide in the case at bar, as we think the evidence given was properly admitted under the specification or charge contained in the information.

Next it is insisted that the evidence was not sufficient

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1860.

DALE  
v.  
EVANS.

to show that there was a public nuisance to the disturbance or annoyance, &c.

There was ample proof of repeated and divers acts which, perhaps, in an order-loving or densely populated neighborhood, might have been considered a disturbance and an annoyance; but there was only one witness who testified that he and his family were annoyed, &c., several that they were not. Was this sufficient? We think it so strongly tends to sustain the verdict as to preclude us from disturbing it. The jury had a right, and perhaps it was their duty, to look to the evidence of the acts done (and the probable consequences thereof), rather than to the testimony of particular witnesses as to the effect such acts had upon them.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. R. M. Bryant*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

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DALE v. EVANS and Others.

Where a writing in the form of a receipt is the mere acknowledgement of the payment of money, or the delivery of a thing, it is but *prima facie* evidence of the fact; but if it also contain a contract to do something in relation to the thing delivered, in so far as it is evidence of that contract between the parties, it stands upon the footing of all contracts in writing, and cannot be contradicted or varied by parol; except, perhaps, that at law the same circumstances of fraud, mistake, or surprise may be shown to set it aside as might be shown in equity to relieve from a contract.

Monday,  
June 4.

APPEAL from the *Hamilton* Court of Common Pleas.

HANNA, J.—*Dale* sued the defendants on the following instrument of writing: “Received *July 22*, 1856, of *J. T. Dale*, one hundred and seventy-nine bushels of wheat, to be paid at the market price when called for.—*J. L. and W. N. Evans* and *Bauchort*,” and averred that on the 22d of

14 288  
148 128  
148 128

*January*, 1857, wheat was worth and of the price, &c., of one dollar per bushel, and that he demanded of defendants 179 dollars.

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1860.

DALE  
v.  
EVANS.

The defendants answered in eight paragraphs. The first was a general, and the second and third special, denials. The other answers set forth, in different forms, this defense, namely, that the wheat was merely deposited with the defendants, and a few days thereafter had been consumed by fire, without their fault; and that the instrument sued on was not, through mistake in the draftsman, made to express the intention and contract of the parties, but that the language and legal effect thereof were different from said contract and intention.

A general denial was filed in reply.

Parol evidence was admitted on the trial, over the objection of the plaintiff, of conversations and statements of the plaintiff, made before the execution of said instrument, as to his intention to deposit his wheat and not to sell the same, and afterwards as to the destruction thereof being his loss, &c. Was the evidence properly received?

Without the averment that there was a mistake, &c., this evidence could not have been received. *Tisloe v. Graeter*, 1 Blackf. 353. See Ind. Dig. 441, for citation of cases.

Where a writing, in the form of a receipt, is the mere acknowledgement of the payment of money, or the delivery of a thing, it is but *prima facie* evidence of the fact; but if it also contains a contract to do something in relation to the thing delivered, in so far as it is evidence of that contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol; except, perhaps, that at law the same circumstances of fraud, mistake, or surprise, may be shown to set it aside, as might be shown in equity to relieve from a contract, &c. 1 Greenl. Ev., § 305.

But the question recurs, was the evidence offered legitimate to show such circumstances? We think not. There is no ambiguity in the language used requiring explanation. We should infer that the writing, when plainly

May Term,  
1860.

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DALE  
v.  
EVANS.

worded, speaks the intention of the parties. The writing should be read by the light of surrounding circumstances, to understand the meaning and intent of the parties, and, if necessary, that far parol evidence might be received; "but, as the parties have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead." *Id.* 277. And therefore, "all testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." *Id.* 275.

These are salutary rules of evidence, and should not be departed from, even in equity, unless in instances where the evidence offered is clear and unambiguous, and relief should not be extended where the evidence is loose, equivocal, contradictory, or in its texture open to doubt or opposing presumptions. 1 Story's Eq., § 157. But where, in a written instrument, there is a plain mistake clearly made out by satisfactory proofs, relief should be granted. *Ibid.*

The evidence received in the case at bar, was not of that direct and positive character required by the canons of evidence above referred to.

It follows, therefore, that as the testimony offered was improperly received, the motion for a new trial, made by the plaintiff, against whom there was a verdict, should have been sustained.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*D. Moss*, for the appellant.

*D. C. Chipman*, for the appellees.

THE LAKE ERIE, WABASH, AND ST. LOUIS RAILROAD COM-  
PANY *v.* LOVELAND.

May Term,  
1860.

THE STATE  
*v.*  
ELY.

APPEAL from the *Huntington* Circuit Court.

Monday,  
June 4.

*Per Curiam.*—This case appears, from the record, to have been tried in *August*, 1857. The questions we are asked to consider are all attempted to be raised by bills of exceptions filed in *December*, 1857. There is no order of Court appearing in the record giving either party time, beyond the term, to prepare such bills, nor leave to file the same at the time they were filed. There is no question before us in such form as to enable us to pass upon it. 2 R. S. p. 115.—*Simonton v. The Huntington, &c., Co.*, 12 Ind. R. 380.

The judgment is affirmed with 5 per cent. damages and costs.

*N. O. Ross* and *W. Z. Stuart*, for the appellants.

*J. Brownlee*, for the appellee.

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THE STATE *v.* ELY.

APPEAL from the *Blackford* Circuit Court.

Monday,  
June 4.

*Per Curiam.*—This appeal was brought here by the prosecuting attorney, on a question attempted to be reserved by the state, under the statute 2 R. S. p. 377.

The point presented is upon the ruling of the Court, in reference to charges given and refused. No part of the evidence is in the record. The point of law attempted to be raised is not, therefore, properly reserved for our consideration. This is conceded. *The State v. Bartlett*, 9 Ind. R. 570.

The appeal is dismissed.

*D. Nation*, for the state.

May Term,  
1860.

DODD  
v.  
SWEETSER.

DODD, Auditor of State *v.* SWEETSER, District Attorney.

The act of 1859, touching the salaries of officers, does not provide a salary for district attorneys.

The offices of prosecuting attorney and district attorney are distinct, notwithstanding the names may have been used interchangeably in some statutes. The one was created by the constitution, the other is a creature of the statute.

Monday,  
June 4.

APPEAL from the *Marion* Court of Common Pleas.

WORDEN, J.—The question involved in this case is, whether the salary act of 1859 gives a salary of 500 dollars per annum to the district attorneys for the Common Pleas districts. The affirmative of this proposition was held by the Court below, and the auditor appeals.

The act (Acts of 1859, p. 74) provides “that there shall be allowed to the several officers of government, and persons hereinafter mentioned, the following annual salaries, to be paid quarterly, out of any moneys in the treasury belonging to the general fund, not specially otherwise appropriated by law: \* \* \* *Eighteenth.* To the prosecuting attorneys, each, 500 dollars.”

The question arises, who were meant by the term prosecuting attorneys, as used in the above enactment?

The eleventh section of the seventh article of the constitution of the state, provides that “there shall be elected, in each judicial circuit, by the voters thereof, a prosecuting attorney, who shall hold his office for two years.”

The first section of the act to provide for the election, and certain duties of prosecuting and district attorneys (2 R. S. p. 385), is as follows:

“Be it enacted, &c. At the general election in the year 1852, and every second year thereafter, there shall be elected in each judicial circuit, a prosecuting attorney, who shall prosecute the pleas of the state, in the Circuit Courts of such circuit. And also, in each Court of Common Pleas district, a district attorney, who shall prosecute the pleas of the state in the Common Pleas and Justices’ Courts of such district.”



Thus it appears that the office was established by the constitution, and the officer designated as a prosecuting attorney. The statute, following the constitution, provides for the election of a prosecuting attorney in each judicial circuit, and makes it his duty to prosecute the pleas of the state in the Circuit Court. The same statute provides for the election of a district attorney in each Common Pleas district, whose duty it is to prosecute the pleas of the state in the Court of Common Pleas, and before justices of the peace. The offices of prosecuting attorney and district attorney are distinct and separate. The duties thereof are, in general, if not always, to be performed in different Courts. The one is established by the constitution, while the other is not known to that instrument. The name of the one officer, as given by the constitution, and as used in the law providing for his election, &c., is that of prosecuting attorney. The name of the other, as designated in the law providing therefor, is that of district attorney.

May Term,  
1860.

DODD  
V.  
SWEETSER.

It is clear to our minds that no just principles of interpretation will permit that portion of the act of 1859, which gives a salary of 500 dollars per annum to prosecuting attorneys, to be construed as embracing any other officers than such as are known to the constitution, and the laws made in pursuance thereof, as prosecuting attorneys.

The legislature, with the constitution before them, providing for the office of prosecuting attorney, the number of which is only to be equal to the number of judicial circuits in the state, cannot be presumed to have used the term prosecuting attorneys with intent thereby to embrace other officers unknown to the constitution, and known to the law creating the offices by another and different appellation.

In some instances in the revision of 1852, and perhaps in subsequent legislation, the legislature may have confounded the term prosecuting attorney with district attorney. These terms may have been used interchangeably, indiscriminately, and improperly, but the context generally, if not always, shows with sufficient certainty what officer was intended.

May Term,  
1860.

OVERMAN  
v.  
FORKNER.

But the fact that the term prosecuting attorney may have been, in previous legislation, improperly used where district attorney was evidently intended, is no sufficient reason why we should attribute to the legislature which passed the act of 1859, an intended misapplication of the phrase; or an intent to embrace thereby not only prosecuting attorneys, but other officers who are not known to the constitution and law as prosecuting attorneys.

It is insisted that, unless the district attorneys are entitled to the salary in question, they have the empty honors of an office, without any compensation whatever. If this be so, the argument would address itself with much force to the legislature, but cannot prevail in the construction of a legislative enactment, so as to extend its operation to cases for which no provision is contemplated by the law itself. It may be observed here, that the district attorneys never have been paid a salary out of the state treasury, while the prosecuting attorneys have. The act in question increases the salary of the prosecuting attorney, while it leaves the district attorneys, so far as salary is concerned, precisely where they stood before the passage of the act in question. If they have no salary now, they had none before the act was passed.

For these reasons, we are of opinion that the Court below erred, and that the judgment must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. E. McDonald*, for the appellant.

*J. N. Sweetser*, for the appellee.

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OVERMAN v. FORKNER and Others.

Monday,  
June 4.

APPEAL from the *Wayne* Circuit Court.

*Per Curiam*.—This was a suit by *Overman* against the appellees, to recover 30 dollars paid by the plaintiff to the

defendants, on a due bill executed by the plaintiff to the defendants, as follows: "Due on the first day of *June* next, fifty dollars for corn-mill, to be sent to *Liverpool, Illinois* river, to be sent from *Cincinnati* by river. *Centreville, March 12, 1855.*"

May Term,  
1860.

CLINTON  
TOWNSHIP  
v.  
DRAPER.

The defendants set up, by way of counter-claim, the above due bill, and on the trial had a finding by the Court in their favor, for the balance remaining unpaid thereon, and judgment, a new trial being refused.

On a careful consideration of the testimony, we think it fails to establish the fact that the corn-mill was sent according to the stipulation mentioned, and therefore that the finding and judgment for the defendants cannot be sustained.

The judgment is reversed with costs. Cause remanded, &c.

*G. W. Julian*, for the appellant.

*O. P. Morton, J. F. Kibbey, J. S. Newman, and J. P. Sisdall*, for the appellees.

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#### CLINTON TOWNSHIP v. DRAPER and Others.

The first section of the act of 1852, "for the more uniform mode of doing township business," provides for the organization of townships. *Held*, that it is not void for inconsistency with the title of the act.

APPEAL from the *Decatur* Court of Common Pleas. *Monday, June 4.*

PERKINS, J.—The commissioners of *Decatur* county, for the purpose of equalizing and rendering more shapely and convenient for the public business, the townships of the county, detached certain territory from *Washington*, and attached it to *Clinton* township. The commissioners acted under a statute found in 1 R. S. p. 495, and entitled "an act for the more uniform mode of doing township business," the first section of which authorizes "the board of county

May Term,  
1860.

THE STATE  
v.  
ADAMSON.

commissioners in each county to lay off and divide the same into any number of townships that the convenience of the citizens may require, and from time to time, as such convenience demands, to alter the boundaries," &c. It is contended that this section of the law is void for not being germane to the subject embraced by its title. The Court so held below.

We incline to a different opinion. The point is not a clear one; but we think the better opinion is, that the organization of the townships may be one of the steps in reaching a more uniform mode of doing the business of the several townships. If so, it is properly connected with the subject of the title. See *Brewster v. The City of Syracuse*, 19 N. Y. R. 116.—*Henry v. Henry*, 13 Ind. R. 250.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.  
*J. Gavin* and *O. B. Hord*, for the township.

14	296
145	459
14	296
156	699
14	296
171	635

THE STATE v. ADAMSON.

The liquor act of 1859 is entitled "An act to regulate and license the sale of spirituous," &c., "liquors, to prevent the adulteration thereof, to repeal former laws," &c., "and to prescribe penalties," &c. *Held*, that the section of the act prohibiting the giving away intoxicating liquor to a minor is properly connected with the subject embraced by the title.

Monday,  
June 4.

APPEAL from the *Clay* Circuit Court.

PERKINS, J.—Indictment against *Adamson* for giving away intoxicating liquor to a minor. Indictment quashed on motion.

The ground upon which the indictment was quashed, appears to have been that the section of the liquor law of 1859, prohibiting the giving away of intoxicating liquor to a minor, was not properly connected with the subject embraced by the title of the law.

The title of the act is as follows:

"An act to regulate and license the sale of spirituous, &c., liquors, to prevent the adulteration thereof, to repeal former laws, &c., and to prescribe penalties," &c,

May Term,  
1860.

THE STATE  
V.  
ADAMSON.

The section referred to is this:

"SEC. 11. If any person shall sell, barter, or give away, any intoxicating liquors to any person under the age of twenty-one years, or to any person at the time in a state of intoxication, the person so offending shall be fined not less than five nor more than one hundred dollars, to which the Court or jury trying the cause may add imprisonment in the county jail for any determined period not exceeding thirty days."

The constitution requires that all matters embraced in a statute shall be properly connected with the subject named in the title.

One branch of the subject included in the title of the act in question, is the licensing—the regulating of—the retail of intoxicating liquors. That subject includes the limitations as to time, place, person, quantity, &c., to be imposed upon the sale. And when we consider the object for which such a law was passed, viz., to prevent abuses that might flow from the unrestrained disposal of liquors in these respects, it would seem that the giving away, under circumstances which might produce the same evil results as the selling, would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary incident to a statute regulating the sale, to secure its efficient operation. It is a necessary precautionary provision to prevent evasion of the prohibition to sell. All experience under license laws proves this.

It is rather a difficult point, in many instances, to determine with legal precision, what is the subject of an act; and a still more difficult one to determine what matter is properly connected with that subject.

The cases in our Reports where these points, or one of them arose, are quite numerous, and yet general rules—general definitions upon these points—have not been laid down. Each case has been decided as an isolated one.

In *Greencastle Township v. Black*, 5 Ind. R. 573, Judge

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1860.

THE STATE  
v.  
ADAMSON.

STUART held that the subject of private, independent schools, was not properly connected, in the constitutional sense, with the subject of the public free common school system.

In *Beebe v. The State*, 6 Ind. R. 551, Judge GOOKINS held that the liquor act of 1855 embraced but one subject, and matters properly connected therewith.

In *The Indiana Central Railway Company v. Potts*, 7 Ind. R. 681, it was held the infliction of penalties upon persons for obstructing highways, was a matter properly connected with the subject of the election and duties of supervisors of highways. And so was, in another case, the taking, and providing for compensation for articles taken for public use, &c. *Dronberger v. Reed*, 11 Ind. R. 420.

In *The Madison and Indianapolis Railroad Co. v. White-neck*, 8 Ind. R. 217, it was held that the matter of exemption from liability for killing stock by railroad machinery, was properly connected with the subject of providing compensation to owners of stock killed by such machinery.

In *Foley v. The State*, 9 Ind. R. 363, and in *Gillespie v. The State*, *id.* 380, it was held that a section upon the trial of indictments before the petit jury, was not properly connected with the subject of the jurisdiction of the grand jury, in finding indictments. See, also, as to repealing sections, 5 Ind. R. 51; 11 *id.* 365. As to the amendment of Common Pleas act, increasing jurisdiction, *Reed v. The State*, 12 *id.* 641. As to the act making bills and notes assignable, *Mewherter v. Price*, 11 *id.* 199. See, also, *Clinton Township v. Draper*, at this term, upon the title of the act relative to mode of doing township business, and the cases there cited. Also, *The State v. Bowers*; *Spaugh v. Huffer*; *Igoe v. The State*, and *Haggard v. Hawkins*, at this term.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*I. N. Pierce* and *J. E. McDonald*, Attorney General, for the state.

*A. T. Rose*, for the appellee.

## HAGGARD and Others v. HAWKINS and Others.

May Term,  
1860.HAGGARD  
v.  
HAWKINS.

The case of *The Board, &c., v. Spitler*, 13 Ind. R. 235, decides most of the points made in this case.

The changing of the boundaries of existing counties, is a matter properly connected with the subject of forming new counties out of those existing.

APPEAL from the *Lawrence* Circuit Court.Monday,  
June 4.

PERKINS, J.—A petition was presented to the board of commissioners of *Lawrence* county for a change of the boundary between that county and *Jackson*. A remonstrance was also filed. At the second term after the filing, the commissioners entered an order upon their record making the change.

An appeal was taken to the Circuit Court. In that Court the proceedings were dismissed, on the ground that the statute under which they were instituted, was unconstitutional. Acts 1857, p. 25.

All the objections urged against the act in this case, or nearly all, were presented and held invalid in *The Board, &c., v. Spitler*, 13 Ind. R. 235.

That case arose upon the section of the act authorizing the formation of new counties out of those existing.

This case arises upon the second section of the act, which authorized the changing of the boundaries of existing counties.

It is claimed that the second section is not properly embraced in the same act with the first. But we have no doubt that the changing of the boundaries of existing counties, is a matter properly connected with the subject of forming new counties out of those existing, which might render many equalizing changes proper, and, therefore, might have been incorporated in the act under the first branch of the title; as it was not necessary to specify properly connected matters in the title. But such specification does no harm. And it is probable, though we have not considered the point, that the formation and fixation of counties and boundaries, is properly one legislative subject.

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1860.

THE STATE  
v.  
RABOURN.

The second section of the act is constitutional; and when proceedings under it have taken place in *Jackson* and *Lawrence* counties, ordering the proposed boundary, it will become the boundary of the counties, to its extent.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for further proceedings.

*T. R. Cobb* and *N. F. Malott*, for the appellants.

*W. T. Otto* and *L. D. Pierson*, for the appellees.

THE STATE, on the relation of *MAY*, v. *RABOURN* and  
Others.

No proper exception having been taken in this case, the motion for a new trial reached nothing but the merits as shown by the evidence.

Monday,  
June 4.

APPEAL from the *Jefferson* Court of Common Pleas.

WORDEN, J.—Suit by the appellant against the appellees, upon a bond executed by *Rabourn* (and the other defendants as his sureties), as guardian of the relator. Answers were filed, issues formed, and the cause tried by a jury, resulting in a verdict and judgment for the defendants, a new trial being denied. No question is raised upon the pleadings in the cause.

Errors are assigned upon the ruling of the Court in giving and refusing instructions in overruling the motion for a new trial; and in refusing to permit the jury to take with them to their room certain written evidence introduced upon the trial.

The reasons filed for a new trial are:

1. The verdict is contrary to law and evidence.
2. The Court erred in its instructions to the jury.
3. The Court erred in giving instructions asked for by the defendants.
4. The Court erred in refusing to give instructions asked for by the plaintiffs.



The ruling of the Court in refusing to permit the jury to take to their room the written evidence, cannot be examined by us, as that was not one of the grounds for which a new trial was asked. If any error was committed, in that respect by the Court, in the abuse of its discretion or otherwise, it should have been made the basis of the motion for a new trial. *Kent v. Lawson*, 12 Ind. R. 675.

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THE STATE  
v.  
RABOURN.

The point is made by the appellees, that no valid exception was taken to any ruling of the Court. If this be so, it precludes any further examination of the cause. No exceptions to the ruling of the Court, either in giving or refusing instructions, appear in the record, other than in the bill of exceptions. It appears by the record that, on the 10th day of *February*, 1858 (the cause having been before that time tried), the motion for a new trial was overruled, to which ruling the relator then excepted, and time was given until the 10th day of *March*, to prepare the bill of exceptions. The bill of exceptions was filed on the first of *March*. The language of the bill of exceptions, in reference to the instructions given and refused, is in the present tense, and relates to the time of filing the bill, and not to the time of the decision. It does not show, even by implication, that any exception was taken to the ruling on the instructions at the time they were given, and those asked refused, but on the contrary, some twenty days afterwards, when it was too late for the Court to correct any errors, if they had been committed. That such exceptions came too late, is settled by the cases of *Leyner v. The State*, 8 Ind. R. 490, and *Johnson v. Bell*, 10 *id.* 363.

As the Court gave time to prepare the bill of exceptions, it would, perhaps, have been sufficient had it shown that the relator excepted to the ruling at the time the instructions were given and refused; but not showing this, the case stands as if no exception had been taken in this respect. It may be observed that the provisions of the 325th section of the code, permitting exceptions to instructions to be taken by writing on them "refused and excepted to," and "given and excepted to," to be signed by the party or his attorney, were not complied with.

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1860.

THE STATE  
v.  
PIERCE.

There having been no proper exception taken to the ruling on the instructions, the motion for a new trial reached nothing but the merits of the case as shown by the evidence. We have seen that the relator excepted, at the time, to the ruling on his motion for a new trial. This appears by the entry made by the clerk on the order-book. The bill of exceptions does not show that the exception was then taken, the language employed being similar to that in reference to the instructions; but it contains the evidence. Perhaps the entry on the order-book showing that exception was taken at the time, and a bill of exceptions afterwards filed setting out the evidence, would constitute a sufficient exception to the ruling on the motion. But we need not decide this point, as upon an examination of the evidence, we think it sufficiently sustains the verdict. The defendants produced the receipt of the relator, showing that after he arrived at majority, *Rabourn*, his guardian, settled with him and paid in full all that was due to him from his said guardian; and we cannot say from the evidence, against the verdict of the jury, that the receipt was unfairly or improperly obtained, or that the settlement was improperly made.

*Per Curiam*.—The judgment is affirmed with costs.

*S. C. Stevens*, for the state.

*J. Sullivan, W. M. Dunn, and A. W. Hendricks*, for the appellees.

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### THE STATE v. PIERCE.—Two Cases.

The information in this case, charging that the defendant, a justice of the peace of, &c., at, &c., solemnized a marriage between, &c., and failed to return and file in the clerk's office a certificate of the marriage, with the license therefor, within three months, &c., contrary, &c., is good.

Section 54, 2 R. S. p. 441, by implication, repeals § 11 of the act regulating marriages, if the latter section would otherwise have any force.

APPEAL from the *Martin* Court of Common Pleas.

May Term,  
1860.

WORDEN, J.—Information against the appellee charging that he, “being a justice of the peace of *Martin* county, and state of *Indiana*, on the 22d day of *November*, 1857, at said county of *Martin*, and state of *Indiana*, did solemnize a marriage between one *McCleslen Jones* and one *Rebecca J. Grisham*, by virtue of a license issued by the clerk of the *Martin* Circuit Court, the said *Rebecca J. Grisham* being then and there a resident of said county, and the said parties competent to contract said marriage; and that the said *Isaac H. Pierce* having solemnized said marriage, did fail and neglect to return and file in the clerk’s office of said county, a certificate of said marriage, with the license therefor, within three months after the same was solemnized, and for a long space of time thereafter, to-wit, the space of five months, contrary,” &c.

THE STATE  
v.  
PIERCE.

Monday,  
June 4.

The information was based upon an affidavit charging the same facts. On motion of the defendant, the information was quashed, and the state excepted.

We are not apprised of the ground upon which the information was quashed, nor do we discover any substantial objection to it. The 8th section of the act regulating marriages, &c. (1 R. S. p. 362), makes it the duty of every person solemnizing any marriage, to file, within three months thereafter, a certificate thereof, in the clerk’s office of the county in which the marriage was solemnized. The 54th section of the act defining misdemeanors, &c. (2 R. S. p. 441), provides that “any person having solemnized a marriage, who shall fail to return a certificate thereof, with the license therefor, within the time prescribed by law, shall be fined not less than five, nor more than one hundred dollars.”

The section above quoted by implication repeals the 11th section of the act regulating marriages, &c., if that section would otherwise have any binding force. *Vide The State v. Horsey*, at the present term (1).

The case made by the information falls within the provisions of the statute, and we think the Court erred in quashing it.

May Term,  
1860.

HALDERMAN  
v.  
BIRDSALL.

*Per Curiam.*—The judgment is reversed with costs.  
Cause remanded, &c.

*J. E. McDonald*, Attorney General, and *A. L. Roache*,  
for the state.

*J. Baker*, for the appellee.

(1) *Ante*, 185.

14 304  
127 500

### HALDERMAN v. BIRDSALL and Another.

The error assigned in this case was, that the Court rendered judgment for the appellees on a demand not due when the suit was brought. No exception was taken to any ruling upon the pleading, the admission of evidence, or instructions to the jury. There was one good count in the complaint. *Held*, that there was no error.

Where the complaint contains one good count, and the verdict is general, the Supreme Court will sustain it.

Monday,  
June 4.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—Action by the appellees against the appellant. Judgment for the plaintiffs below.

The only error assigned is, that judgment was rendered for the appellees when it should have been rendered for the appellant, and “there is error in this that said Court rendered judgment in favor of said appellees on a demand not then due or due at the time of suit brought.”

There was no exception taken to any ruling of the Court on the pleadings, or the admission of evidence, or instructions to the jury, nor is the evidence set out. Hence the question sought to be raised by the assignment of errors is not presented by the record, unless the objection thus made requires an examination of the complaint, to ascertain whether it “states facts sufficient to constitute a cause of action.” Acts of 1855, p. 60. But this would not avail the appellant. Without deciding that the assignment of errors would reach such defect in the com-

plaint, either with or without a motion in arrest of judgment in the Court below, none having been made in that Court, we are of opinion that the complaint is sufficient to sustain the judgment.

May Term,  
1860.

SPAUGH  
v.  
HUFFER.

The complaint contains five paragraphs, four of which are for the recovery of the value of certain goods. The goods were, in part, alleged to have been sold by the plaintiffs to the defendant on a credit that had not expired at the time the suit was brought, fraud being alleged in the purchase of them. We need not decide whether these counts contain facts sufficient, &c., as there was another paragraph for money had and received by the defendant for the use of the plaintiffs, for more than the amount recovered, and to this count the objection does not apply. This count, at least, contains a good cause of action for more than the amount recovered, and the verdict being a general one, we cannot say that it was not found upon this count.

As the judgment will have to be affirmed for the reason indicated, we have not thought it necessary to examine carefully the validity of the other paragraphs, or to express any opinion upon them.

*Per Curiam.*—The judgment is affirmed with 2 per cent. damages and costs.

*M. G. Bright*, for the appellant.

*T. T. Crittenden* and *H. W. Harrington*, for the appellees.

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SPAUGH and Another v. HUFFER, Administrator.

APPEAL from the *Bartholomew* Circuit Court.

Monday,  
June 4.

*Per Curiam.*—Suit upon a note given by a constable on the purchase of a judgment. Defense set up, illegality of consideration.

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*Per Curiam.*—The judgment is reversed with costs.  
Cause remanded, &c.

HALDERMAN  
v.  
BIRDSALL.

*J. E. McDonald*, Attorney General, and *A. L. Roache*,  
for the state.

*J. Baker*, for the appellee.

(1) *Ante*, 185.

14 304  
197 500

### HALDERMAN v. BIRDSALL and Another.

The error assigned in this case was, that the Court rendered judgment for the appellees on a demand not due when the suit was brought. No exception was taken to any ruling upon the pleading, the admission of evidence, or instructions to the jury. There was one good count in the complaint. *Held*, that there was no error.

Where the complaint contains one good count, and the verdict is general, the Supreme Court will sustain it.

Monday,  
June 4.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—Action by the appellees against the appellant. Judgment for the plaintiffs below.

The only error assigned is, that judgment was rendered for the appellees when it should have been rendered for the appellant, and “there is error in this that said Court rendered judgment in favor of said appellees on a demand not then due or due at the time of suit brought.”

There was no exception taken to any ruling of the Court on the pleadings, or the admission of evidence, or instructions to the jury, nor is the evidence set out. Hence the question sought to be raised by the assignment of errors is not presented by the record, unless the objection thus made requires an examination of the complaint, to ascertain whether it “states facts sufficient to constitute a cause of action.” Acts of 1855, p. 60. But this would not avail the appellant. Without deciding that the assignment of errors would reach such defect in the com-

plaint, either with or without a motion in arrest of judgment in the Court below, none having been made in that Court, we are of opinion that the complaint is sufficient to sustain the judgment.

May Term,  
1860.

SPAUGH  
v.  
HUFFER.

The complaint contains five paragraphs, four of which are for the recovery of the value of certain goods. The goods were, in part, alleged to have been sold by the plaintiffs to the defendant on a credit that had not expired at the time the suit was brought, fraud being alleged in the purchase of them. We need not decide whether these counts contain facts sufficient, &c., as there was another paragraph for money had and received by the defendant for the use of the plaintiffs, for more than the amount recovered, and to this count the objection does not apply. This count, at least, contains a good cause of action for more than the amount recovered, and the verdict being a general one, we cannot say that it was not found upon this count.

As the judgment will have to be affirmed for the reason indicated, we have not thought it necessary to examine carefully the validity of the other paragraphs, or to express any opinion upon them.

*Per Curiam.*—The judgment is affirmed with 2 per cent. damages and costs.

*M. G. Bright*, for the appellant.

*T. T. Crittenden* and *H. W. Harrington*, for the appellees.

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SPAUGH and Another v. HUFFER, Administrator.

APPEAL from the *Bartholomew* Circuit Court.

Monday,  
June 4.

*Per Curiam.*—Suit upon a note given by a constable on the purchase of a judgment. Defense set up, illegality of consideration.

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1860.

THE TOWN OF  
WILLIAMSP-  
PORT, &C.

v.  
KENT.

In the code of 1852, at p. 449, commences an act entitled "An act providing for the election and qualification of justices of the peace, and defining their jurisdiction, powers, and duties in civil cases."

The 113th section of that act provides that no constable shall purchase a judgment on the docket of any justice in the township of the constable.

At p. 480 of the same volume of the code, commences an act entitled "An act prescribing the number, and defining the powers and duties of constables."

It is manifest that the provision touching constables, above mentioned, is misplaced. It should have been in the act in relation to constables. It is not embraced by, nor properly connected with, the subject of the justices' act.

The purchase of a judgment by a constable, in a case where no execution comes to him for its collection, is not, *per se*, void at common law.

The judgment is affirmed with 5 per cent. damages and costs.

*R. Hill*, for the appellants.

*W. Herod* and *S. Stansifer*, for the appellee.

14	306
144	975
144	513

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THE TOWN OF WILLIAMSPORT and BUEL, Treasurer of  
*Warren County, v. KENT and Another.*

The trustees of a town have no power under the statute to assess and levy the corporation tax for the year, after the third *Tuesday* in *May*.

Where a power is given to a corporation by statute, and a time fixed within which the power must be exercised, the power fails at the expiration of the time.

*Tuesday,*  
*June 5.*

APPEAL from the *Warren* Court of Common Pleas.

DAVISON, J.—This was a complaint by the appellees, who were the plaintiffs, for an injunction against the appellants, who were the defendants. The object of the suit



was to enjoin the town of *Williamsport* from collecting a corporation tax assessed against the plaintiffs.

May Term,  
1860.

Plaintiffs allege that the trustees of said town levied the tax in question, and delivered their duplicate containing said tax, to the county auditor, who entered it upon his duplicate, and that *Buel*, the county treasurer, is proceeding to collect the tax so levied, &c. It is averred that that tax was not levied according to law, in this, that it was levied on the 21st of *July*, 1855, when the statute then in force required all such taxes to be levied prior to the third *Tuesday* in *May*, in each year; and further, the same was levied by said trustees to pay interest upon a debt created by them for the purchase of a building known as the county seminary, which debt was created by said trustees without authority of law, &c.

THE TOWN OF  
WILLIAMS-  
PORT, &c.  
v.  
KENT.

Defendants demurred to the complaint; but their demurrer was overruled, and thereupon they filed an answer alleging that said trustees, before the third *Tuesday* of *May*, 1855, determined upon the amount of taxes to be assessed for that year, and directed the assessor to assess the property in said town, and make return by the second *Tuesday* in *June*; that they caused notice to be given that on the 19th of *June*, 1855, they would hear all objections to the assessment, and they aver that on said day the plaintiffs appeared, and had the assessment, as to them, corrected and reduced, and that upon all such objections having been heard and disposed of, the trustees levied a tax upon all the taxable property of said town, the plaintiffs' property included, of 37½ cents on the 100 dollars, and 25 cents on each poll. It is averred that this tax was assessed and levied for town purposes, and not to purchase a building known as the county seminary, or to pay interest on a debt incurred for such purpose.

The issues were submitted to a jury, who found a general verdict for the plaintiffs, and also specially, as follows: "That the town of *Williamsport* was incorporated in the spring of 1854; and on the 14th of *May*, 1855, the board of trustees of the town determined upon the amount of the general tax for the current year; that the corporation

May Term,  
1860.  
THE TOWN OF  
WILLIAMSPORT, &C.  
V.  
KENT.

assessor returned the assessment rolls to the trustees on the 19th of *June*, 1855, and on the 21st of *July* following, they levied the tax for that year." The jury also found that the corporation has contracted for the county seminary without any petition from the tax-payers, and that the tax for 1855 was levied, in part, to provide for that contract."

Upon the return of the verdict, the defendants moved for a new trial; but their motion was overruled, and judgment rendered for the plaintiffs.

The several orders of the board of trustees relative to the amount, assessment, and levy of the tax in question, are in these words:

"*May* 14, 1855. The board proceeded to determine the amount of general tax, and on motion it was ordered that there shall be levied the sum of 500 dollars for the current year, and that the assessor shall assess all property in the town of *Williamsport* liable to taxation, and return his assessment roll on or before the second *Tuesday* of *June*, 1855.

"*June* 19, 1855. The board met and examined the assessment roll, and corrected it.

"*July* 21, 1855. Ordered by the board, that there shall be 37½ cents levied on each 100 dollars of taxable property in the town of *Williamsport* for town purposes, and 25 cents on each poll in said town, for like purposes, for the year 1855."

In view of these orders, the taxes levied could be applied to no other than ordinary town purposes. Hence, the inquiry arises, were they, for such purposes, legally assessed and levied?

The act for the incorporation of towns, &c., declares that "the board of trustees shall, before the third *Tuesday* in *May* of each year after the town shall have been incorporated, determine the amount of general tax for the current year; but the tax for the year in which the town is incorporated, may be determined at any time by the board of trustees."

Here, the evidence shows that the town of *Williamsport*

was incorporated in the spring of 1854, but the tax, in this instance, was not levied until the 21st of *July*, 1855. It therefore becomes necessary to inquire whether the board of trustees had power to levy it after the third *Tuesday* in *May*. As we construe the provision to which we have referred, the words "determine the amount of general tax for the current year," mean the final determination of the board as to the amount, assessment, and levy of taxes for the current year. And this construction being correct, it follows that the board had no power to order the assessment and levy, in this case, after the third *Tuesday* of *May*.

May Term,  
1860.

FOX  
v.  
BARKER.

It is said in argument that the time designated is merely directory; that the statute contains no negative words inhibiting the trustees from making the levy afterwards; and that the tax was, therefore, duly levied. We think otherwise. It may be laid down as a general rule, that "where a power is given by statute to a corporation, and a time fixed within which that power shall be exercised, it must be executed within that time or the power is gone."

And to this rule, the present case is not, in our opinion, an exception. The result is, the board of trustees, after the third *Tuesday* of *May*, 1853, had no power, under the statute, to order the assessment and levy of taxes for ordinary town purposes for the current year, and that the plaintiffs are not, therefore, liable for the tax thus levied on their property.

*Per Curiam*.—The judgment is affirmed with costs.

*R. A. Chandler*, for the appellants.

*J. R. M. Bryant*, for the appellees.

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FOX v. BARKER.

A set-off is good, to the extent of the sum sued for, though a suit upon it would have been barred by the statute of limitations, at the date of the cause of action against which it is pleaded.

May Term,  
1860.

FOX  
V.  
BARKER.

Tuesday,  
June 5.

APPEAL from the *Hendricks* Circuit Court.

WORDEN, J.—Action by the appellant against the appellee upon a promissory note made in the year 1857 by the defendant to one *Cox*, and by the latter indorsed to the plaintiff.

The defendant set up by way of defense, an offset for work and labor performed by the defendant for the plaintiff, in the years 1849, 1850, and 1851. The set-off was allowed, leaving a small balance in favor of the plaintiff, for which he had judgment.

The only question raised in the case is, whether the set-off should have been allowed. The appellant claims that it was barred by the statute of limitations, and could not be made available as a defense.

The statute provides that “a party to an action may plead or reply a set-off or payment to the amount of any cause of action or defense, notwithstanding such set-off or payment is barred by the statute.” 2 R. S. p. 77, § 214.

The counsel for the appellant insists that this provision should be construed to embrace only such matters of set-off as accrued subsequently to the cause of action, and not such as accrued prior thereto, as in the case at bar. He argues thus:

“Taking the section in question in its literal signification, no man can find a reason for it. Apply it to a set-off that accrued after the cause of action, and it is reasonable and just. If *A.* holds a note on *B.* which would not be barred for twenty years, and *A.* afterwards makes an account with *B.* which would be barred in six years, it is just and right that *B.*’s account should not be barred, for really it would be a payment on the note. Thus far there is a reason for the section referred to, but further there is none; and when the reason of a law ceases, the law itself ought to cease with it.”

Whatever force there may be in this view of the question when addressed to the law-making power, we think it cannot prevail with the Courts in the construction of the statute. Its terms are broad and unequivocal, and do not admit of the limited construction contended for. It em-

braces matters of set-off which accrued before, as well as those which accrued after, the cause of action. This construction is fully sustained by the case of *Livingood v. Livingood*, 6 Blackf. 268. Indeed, the construction contended for by the appellant would require that case to be overruled. The question there arose upon similar statutory provisions. The suit was commenced in 1840, upon a bill dated *November 1*, 1833. A set-off was pleaded. Replication that the cause of set-off did not accrue within five years next before the first day of *November*, 1833. Demurrer to the replication. The Court, after citing the statutory provisions, say: "It is the object of both to prevent the statute of limitations from operating upon so much of the set-off as shall equal the plaintiff's demand; the excess, if any, is barred; and it is immaterial though the matter of set-off, had it been prosecuted by suit, would have been barred at the date of the cause of action against which it is pleaded."

May Term,  
1860.

WOODFORD  
v.  
LEAVEN-  
WORTH.

This case holds not only that a set-off may be pleaded which accrued before the cause of action, although barred at the time the suit is brought, but that such set-off may be pleaded, although barred by the statute at the time the cause of action accrued.

We are of opinion that no error was committed in admitting evidence of the set-off, and allowing it, and, therefore, that the judgment should be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*P. S. Kennedy*, for the appellant.

*L. M. Campbell*, for the appellee.

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WOODFORD v. LEAVENWORTH, Administrator. .

14	311
150	476
150	408
14	311
150	320

In an action founded upon the covenants in a deed, a copy of the deed must be set out.

To constitute a breach of a general covenant of warranty, there must have

May Term,  
1860.

WOODFORD  
v.  
LEAVEN-  
WORTH.

been an entire want of title in the grantor, or an eviction by a paramount title.

In an action against an administrator for money paid for the use of the estate of his decedent, the complaint must show that the money was paid at the request, express or implied, of the deceased or the defendant.

The abolition of the distinction between actions at law and suits in equity, does not entitle a party to recover in a case where, before such abolition, he could not have recovered either at law or in equity.

If a grantee accept a deed without sufficient covenants against incumbrances, he cannot recover for money paid in removing incumbrances, unless it was paid under such circumstances as to raise an implied assumpsit.

Tuesday,  
June 5.

APPEAL from the *Crawford* Court of Common Pleas.

WORDEN, J.—Complaint by the appellant against the appellee, stating, in substance, the following facts, viz.: That the estate of *Julius Woodford*, deceased, was justly indebted to the plaintiff in the sum of 500 dollars, for money laid out, expended, and advanced for the use and benefit of said estate, in this, that in the lifetime of said *Julius*, to-wit, on the 15th of *October*, 1842, the said *Julius* sold and conveyed to the plaintiff, by deed of general warranty, certain real estate lying in *Crawford* county, and covenanted that he and his heirs would forever warrant and defend the premises to the plaintiff, his heirs and assigns, against the lawful claims of all persons whomsoever; that the real estate thus conveyed was encumbered by a mortgage, executed by the deceased in 1837 to the state of *Indiana*, for 1,000 dollars, payable five years after the date thereof to the commissioners of the sinking fund, for the benefit of the state, together with interest at the rate of 9 per cent. per annum, payable annually in advance; that 500 dollars of the principal and one year's interest thereon, were still due upon the mortgage at the time of the death of said *Julius*, which balance of 500 dollars principal, and the interest accruing thereon, constituted a legal incumbrance upon the premises, for the payment of which the estate of said *Julius* is liable; that in order to keep the mortgage from being foreclosed, and for the benefit of the estate of the deceased, the plaintiff, since the death of the deceased, has paid the interest due on the mortgage since the year 1846 up to the present time,

amounting to 500 dollars; that the estate of said *Julius*, at the time of his death, was entirely insolvent, without means of paying any part of the interest, and so continued until 1857, when, by an act of congress, it was rendered solvent, and now has means whereby the money thus paid by the plaintiff can be refunded to him; wherefore he demands judgment for the same.

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To this complaint a demurrer was sustained, and exception taken; and final judgment was rendered for the defendant.

The only question is whether the demurrer was correctly sustained. The action does not seem to be founded upon the covenant in the deed; but were that the case, the complaint would be defective for two reasons, if for no other: First, because no copy of the deed is set out as required by the statute; and, second, because the covenant as described in the complaint, is only one of general warranty, and not against incumbrances, and the facts alleged do not constitute a breach of the covenant of warranty. To constitute a breach of the covenant of warranty, there must have been an entire want of title in the grantor, or an eviction by a paramount title. *Hooker v. Folsom*, 4 Ind. R. 90.—*Hannah v. Henderson*, *id.* 174.

The complaint is equally defective considered as founded on the payment of the money by the plaintiff for the use of the estate of the deceased. It is not shown that the money was paid at the request of the deceased or the defendant, either express or implied. In order to entitle a party to recover for money paid, "the defendant's express or implied request to the plaintiff to pay the money for his use, should be shown by the plaintiff. It is not sufficient to prove merely the defendant's liability to a third person, and the plaintiff's discharge of such responsibility. It is necessary to establish that the plaintiff did so at the instance of the defendant, or that the act was subsequently recognized by him. For it is a clearly established principle, that no assumpsit can be raised on the voluntary and unasked payment of the debt of another person; and that one man cannot become the creditor of another without

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The appellant insists, however, "that as he bought the land in good faith, and paid the full value therefor, by the practice of Courts blending law and equity together, under the circumstances of this case as set forth in the complaint, he has a right to recover back the money paid by him as interest to prevent the land from being sold," the estate being insolvent and unable to pay it until the passage of the act of congress mentioned. We are not able to perceive that the insolvency of the estate of the deceased can have much influence upon the determination of the question involved. It is undoubtedly true, however, that if by the rules of either law or equity, the plaintiff is entitled to recover on the facts stated, he may do so in this case. But the abolition of the distinction between actions at law and suits in equity, does not entitle a party to recover in a case where, before such abolition, he could not have recovered either at law or in equity. We are not apprised of any legal or equitable principle that would entitle the plaintiff to recover upon the facts stated, nor has any authority been cited by the appellant tending to sustain the action. It is clear that the action will not lie as for money paid. If the appellant took the conveyance without covenants sufficient to protect him against incumbrances, it was his own folly, and he cannot call upon the Courts to protect him from the consequences of his own imprudence by extending the covenant of warranty beyond its legitimate scope and effect. "If the grantee accepts a deed without covenants, and the case be free from fraud, he cannot recover back the consideration-money, though the title fails." 4 Kent (5th ed.), p. 471, note 6. So, if a grantee accept a deed without sufficient covenants against incumbrances, he cannot recover for money paid in removing such incumbrances, unless paid under such circumstances as will raise an implied assumpsit, which we have seen was not the case here.

We are of opinion that the ruling below on the demurrer was correct, and that the judgment should be affirmed.



*Per Curiam.*—The judgment is affirmed with costs.

*A. J. Simpson*, for the appellant.

*W. A. Porter*, for the appellee.

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*Quere*, whether bargaining for usurious interest at one time, and receiving it at a subsequent time, constitute separate offenses, so that a prosecution barred as to the bargaining, would lie as to the receiving.

If such a prosecution would lie, the usurious interest must be proved to have been received from the person from whom it is charged in the information to have been received.

APPEAL from the *Allen* Court of Common Pleas.

Tuesday,  
June 5.

WORDEN, J.—Information against the appellant for usury. Plea, not guilty. Trial by jury; conviction and judgment; motion for a new trial, and in arrest of judgment being overruled.

The information was filed on the 10th of *January*, 1859, and charges that on or about the 5th of *August*, 1857, at said county, the defendant received from one *William Schoenell*, by virtue of a certain contract made on the 5th day of *August*, 1856, between the defendant and *Schoenell*, 100 dollars for the use of 400 dollars for one year, being at the rate of 25 dollars interest on each 100 dollars, so that the defendant received 76 dollars usurious interest.

The material facts, as shown by the evidence, are as follows: On the 5th day of *August*, 1856, *Schoenell*, desiring to borrow some money, made an arrangement, through a third person, to procure the same of the defendant. A note was executed by *Schoenell* to the third person for 500 dollars, payable in one year, and also a mortgage to secure the same, on a city lot. The note and mortgage were indorsed over to the defendant, by the nominal payee, and the defendant advanced to *Schoenell* 400 dollars.

Sometime before the note and mortgage matured, *Schoe-*

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*nell*, finding he could not raise the money, sold the mortgaged premises to one *John L. Balts*. Before the note and mortgage matured, *Balts* paid off the same to the defendant, a small deduction being made on account of payment before maturity.

On this state of facts, the verdict and judgment cannot be sustained.

The statute on which the information is predicated, provides that "Any person who shall, directly or indirectly, bargain for, receive, or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law, shall be fined," &c.

It is unnecessary, for the purposes of this case, to determine whether a bargain for illegal interest, and a subsequent receiving of the interest thus bargained for, constitute two separate offenses or whether they amount to only one; nor need we determine whether the facts which transpired on the 5th of *August*, 1856, amounted to a reservation of the usurious interest. Whatever offense was committed on the day last named, by the transaction which then took place, was barred by the statute of limitations before the information was filed, more than two years having elapsed, and it not being shown, either by averment or proof, that any of the exceptions to the limitation applies to the case.

We understand the information as charging simply a receiving of the usurious interest, on the 5th of *August*, 1857, by virtue of the previous agreement. On the supposition that the prosecution could be maintained for receiving the usury, after the offense of bargaining for it was barred by the statute of limitations, still the case is not made out, as there is no proof whatever that the defendant received it from *Schoenell*, as charged in the information. The proof is, that *Balts* paid off the note and mortgage to the defendant. It does not appear that he paid it for, or on behalf of, *Schoenell*. The latter sold the lot to *Balts*, who liquidated the incumbrance upon it. For aught that appears, and this is perhaps the legitimate inference, *Schoenell* sold the lot to *Balts*, subject to the incumbrance.

*Schoenell* could have defended as to all except the 400 dollars. Whether *Balts* could, or not, we need not determine, as the money thus paid by him cannot be said to have been received by the defendant from *Schoenell*.

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For these reasons, the judgment must be reversed.

*Per Curiam*.—The judgment is reversed. Cause remanded, &c.

*M. Jenkinson*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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BRADY and Others v. BALL.

In an action for damages for an injury done by trespassing animals belonging to several persons, the plaintiff may elect to sue all or only a part of the owners.

[14 317]  
[158 118]

At common law, and in the absence of any controlling statute, the owner of cattle is bound to confine them upon his own land.

The second section of the act concerning enclosures, &c. (1 R. S. p. 292), prohibiting a recovery for animals breaking into an enclosure, unless the fence is lawful, applies only to outside fences.

Thus in an action for damages for a trespass by animals breaking through a partition fence, it is no defense that the fence was insufficient.

APPEAL from the *Tippecanoe* Circuit Court.

Tuesday,  
June 5.

WORDEN, J.—Suit by the appellee against the appellants, to recover damages for injury done by trespassing animals. Verdict and judgment for the plaintiff, a new trial being denied. The material facts are as follows: A lot of cattle belonging jointly to the defendants and one *Jefferson D. Brady* were being pastured by their owners in a field belonging to one *Stockton*. They broke through the partition fence between the field of *Stockton* and the premises of *Robert Foresman*, and entered the latter, thence through the partition fence between *Foresman's* premises and the plaintiff's wheat-field, and thence into his corn-field, eating and otherwise destroying the plaintiff's corn and wheat.

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v.  
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At the proper time, the defendants asked the Court to charge the jury that, if they found from the evidence that the cattle belonged to the defendants and *Jefferson D. Brady*, they should find for the defendants. This was refused, and exception taken. This instruction was correctly refused. The action was for a tort, and the plaintiff had his election to sue all, or only a part, of the owners of the cattle. Chit. Pl. 86. *Vide*, also, Perk. Pr. 144.

The defendants also asked the following instruction, which was refused, viz.:

“If the jury believe from the evidence that the partition fence between the lands of *Robert Foresman* and the field where these cattle were pastured was owned, one-half by *Foresman*, and the other by the owner of the field where the cattle were pastured, and the cattle broke through the part owned by *Foresman*, and that this fence was not such a fence as a careful farmer ought to maintain as a partition fence, and that the fence between the land of *Foresman* and the field of Mr. *Ball*, in which the injury was committed, was also an insufficient fence, and not such an one as a careful farmer ought to keep, then you should find for the defendants.”

The Court read to the jury, as containing the principles of law binding on the Court and jury, a part of the opinion of this Court in the case of *Myers v. Dodd*, 9 Ind. R. 290.

The Counsel for the appellants do not claim that the case thus read from was wrongly decided, but that the facts in that case were so essentially different from those in the case at bar, that the decision was not applicable here, and that the Court should have pointed out the difference to the jury.

We do not think that any error was committed in refusing the charge asked, or in giving the jury, as a correct exposition of the law, the extract from the opinion in the case mentioned.

The case of *Myers v. Dodd* settles two questions which are decisive of the present. It involved a trespass, committed by the cattle of an adjoining proprietor passing from the defendant's land on to that of the plaintiff, a part of

the partition fence having been carried away by high water, and being otherwise dilapidated. It decides that, at common law, and in the absence of any controlling statute, the owner of cattle is bound to confine them upon his own land, and that there was no controlling statute affecting that case. It also decides that the second section of the act concerning enclosures, &c. (1 R. S. p. 292), prohibiting a recovery for an animal breaking into an enclosure unless the fence was lawful, only applied to outside fences, and had no application to that case, and that the defendant was liable for the trespass. According to the principles there decided, if, in the present case, the cattle had been placed by the defendants in the field of *Foresman*, and had gone from there upon the premises of the plaintiff, the defendants would have been liable for the injury, although the partition fence was insufficient, and not such an one as a careful farmer ought to keep; and it seems to us that the case is not altered by the fact that the cattle were placed in the field of *Stockton*, and broke from there into the premises of *Foresman*, although the fence between them was also insufficient. Neither of the fences through which the cattle broke was an outside fence.

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v.  
BALL.

The remark of the Court in *Myers v. Dodd* (which was read to the jury, and of which counsel complain), that "both parties were equally bound to maintain the partition fence," and that "either party might have repaired it, and enforced contribution from the other," may not have been applicable to the case here, but it was entirely harmless, as the general propositions decided were applicable and conclusive upon the facts involved in this case, without regard to the character of the fences as to sufficiency, over which the cattle broke.

We cannot disturb the verdict upon the evidence, which seems to be sufficient to sustain it.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. M. La Rue* and ——— *Royse*, for the appellants.

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*v.*  
WORTHING-  
TON.

The contrary not appearing by the record, it will be presumed that the Court trying the cause was regularly held, and the cause properly brought to trial.

In an action for the use and occupation of premises, the plaintiff may recover what the use was worth during the occupancy of the defendant, although that sum, in proportion to the annual value, be greater than the time of the occupancy in proportion to the whole year.

Tuesday,  
June 5.

APPEAL from the *Warren* Court of Common Pleas.

WORDEN, J.—Suit by the appellee against the appellant, for the use and occupation of a certain warehouse. Trial by jury. Verdict and judgment for the plaintiff, over a motion for a new trial.

It is assigned for error that the cause was tried in vacation, after the expiration of the time fixed by law for the sitting of the Court. It appears by a bill of exceptions, "that before entering into the trial of the cause, the defendant objected to entering upon the trial, because the Court had no jurisdiction of the cause at this term of the Court, and had no right to try the cause," &c.; but the objection was overruled, and the cause proceeded to trial. It sufficiently appears by the record, that the cause was tried at an adjourned term of the Court. Indeed, the bill of exceptions shows that it was not tried in vacation, but at a term of the Court. The statute fully authorizes the Court to hold an adjourned term, for the purpose of completing the business undisposed of. Acts of 1855, p. 78, § 94. The contrary not appearing, we will presume that the Court was regularly held, and the cause properly brought to trial.

The reasons filed for a new trial were, that the verdict was not sustained by the evidence, and that the Court refused to instruct the jury as asked by the defendant.

The following is the instruction asked by the defendant, the first part of which was given, and the latter part refused, viz.: "In an action for the use and occupation of premises, the plaintiff can only recover for the time during which the premises were actually used and occupied, unless

a contract to the contrary effect is proven. And where he recovers merely for use and accupation, in the absence of any contract, the proportionate amount of the annual value is all that he can recover."

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V.  
WORTHING-  
TON.

It may, perhaps, be questionable whether the proposition laid down in the first branch of the instruction is not more favorable to the defendant than he could ask, inasmuch as all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, are deemed tenancies from year to year. We are not called upon, however, to decide whether, in some cases, an action for use and occupation would not lie for a whole year's rent, where there was such general tenancy, though the premises were not actually occupied for the whole year by the tenant.

The latter branch of the instruction was correctly refused. The suit was brought for a year's rent. The Court had already told the jury, in effect, that the plaintiff could only recover for the time the defendant occupied. We know of no principle or decision limiting rent to be recovered, for use and occupation for less than a year, to a sum only proportionate to the annual value of the premises. The use of a building (as in this case, a warehouse), may, during a part of the year, be worth much more than during the other part, owing to the purposes to which it is applied, the nature of the business carried on, and the season of the year when the business is conducted. The use of a warehouse used for storing grain, for a period of the year embracing the time when grain is usually stored, might be worth nearly the whole of the annual value. We are of opinion that the plaintiff was entitled to recover at least what the use of the premises was worth during the period they were occupied by the defendant, although that sum was greater, in proportion to the annual value, than the proportion which the time occupied bore to the whole year.

Error is assigned upon the ruling of the Court upon the admission of testimony, but as a new trial was not asked upon this ground, the error, if any was committed, was

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GRAHAM.

waived, and we need not examine as to the correctness of the ruling. *Kent v. Lawson*, 12 Ind. R. 675.

We cannot reverse the judgment upon the evidence. That, to say the least of it, tends to support the verdict, and we cannot say that substantial justice has not been done.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*R. A. Chandler*, for the appellant.

*M. M. Milford, I. A. Rice and A. A. Rice*, for the appellee.

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The words, "This was all the evidence given to the Court," do not meet the requirement of the 30th rule.

One of the reasons for a new trial was as follows: "Because of error of law occurring at the trial, and excepted to by the defendant at the time."

*Held*, too vague.

Tuesday,  
June 5.

APPEAL from the *Henry* Court of Common Pleas.

WORDEN, J.—Action by the appellee against the appellant, to recover damages for the breach of a contract for the sale and delivery of some corn. Also, upon a note. Trial by the Court. Finding and judgment for the plaintiff, over the defendant's motion for a new trial.

There were four reasons filed for a new trial, the first three of which relate to the sufficiency of the evidence to sustain the finding, and the fourth is as follows: "Because of error of law occurring at the trial, and excepted to by the defendant at the time."

There was a bill of exceptions filed which sets out evidence, but does not state, as required by the 30th rule, that "this was all the evidence given in the cause." This case is similar to that of *Chapel v. Washburn*, 11 Ind. R. 393, where it was held that the statement that "the following



was all the evidence given to the Court," did not meet the requirements of the rule. That case, in this respect, is decisive of the present. The evidence not being considered before us, we must presume that the finding was sustained by it.

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GRAHAM.

The fourth reason for a new trial is too vague and indefinite, in our opinion, to raise any question. The question sought to be raised under it, has reference to the admission of testimony, to the admission of which exception was taken by the defendant.

In *Kent v. Lawson*, 12 Ind. R. 675, it was held that any matter for which a new trial may be granted, is waived by the neglect of the party to move for a new trial; and that the admission of improper testimony is one of the causes for which a new trial may be granted. It follows that the admission of improper evidence cannot be assigned for error, unless it has been brought under the review of the Court, on a motion for a new trial.

The 355th section of the code, contains eight specifications of causes for which a new trial may be granted. The eighth is "error of law occurring at the trial, and excepted to by the party making the application." The reason for a new trial, under consideration, is substantially in the language of the statute. But it does not therefore follow that it is sufficient. In *Humphries v. The Administrators of Marshall*, 12 Ind. R. 609, it was held that "the reasons filed for a new trial are sufficient, if they, with reasonable certainty, apprise the Court and the opposite party of the ground upon which a new trial was asked." That, it seems to us, was not done in the present case. Numerous errors might occur on the trial, and be excepted to; and the reasons for a new trial ought to point out such as are relied upon, so that the attention of the Court would be directed to them. Otherwise, it would be of but little use to have written reasons filed at all. Exceptions might be taken to the admission of testimony; to the exclusion of testimony; to charges given to the jury; to the refusal to charge as asked; and to various other rulings of the Court, in the progress of the trial; and if the

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general language employed in this case be sufficient, the Court would be required to review all its various rulings to which the party had taken exception, although the party called its attention to but one, or, indeed, none of them, on the motion for a new trial.

If the reason for a new trial in this case be sufficient because it is in the language of the statute, the same rule will apply to the other causes mentioned in the statute, for which a new trial may be granted. Take the first specification: "Irregularity in the proceedings of the Court, jury, or prevailing party, or any order of the Court, or abuse of discretion, by which a party was prevented from having a fair trial." An application for a new trial for any of the above causes, without specifying what particular irregularity, or order of the Court, or abuse of discretion, was relied upon, would not apprise any one of the grounds upon which the new trial was asked.

*Per Curiam.*—The judgment is affirmed with costs.

*W. Grose*, for the appellant.

*J. H. Mellett* and *E. B. Martindale*, for the appellee.

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CHANDLER, Administrator, v. SCHOONOVER.

As a general rule, an administrator, upon a sale of the intestate's property, cannot receive in payment anything but money.

He cannot apply the proceeds of such sale upon his individual debts.

Thus, the purchaser of a lot at an administrator's sale, credited the amount of the notes for the purchase-money, with interest, on a note held by him upon the administrator, and the latter surrendered the notes for the purchase-money, and made a deed. *Held*, that this was no payment; and that an action by an administrator *de bonis non*, would lie to recover the purchase-money, or set aside the sale.

The admissions of a party must be received with caution by the jury, particularly, when the witness can only give part of them.

A receipt for money is *prima facie* evidence of its contents.

Tuesday,  
June 5.

APPEAL from the *Warren* Court of Common Pleas.

DAVISON, J.—The complaint, in this case, alleges that

*Chandler*, who was the plaintiff, is the administrator, *de bonis non*, of *James Rowland*, deceased, and that one *Deloss Warren*, the former administrator, on the 26th of *February*, 1855, filed his petition in said Court, representing that the personal property of the intestate was insufficient to pay the outstanding debts against his estate, and praying that certain real property, describing it, be sold and converted into assets for the payment of debts, &c. Such proceedings were had on said petition, that *Warren*, as administrator, at the *July* term, 1855, reported that he had sold lot No. 136, in the west addition to the town of *Williamsport*, to said *Schoonover*, for 128 dollars, one-half payable in six months, and the residue in one year, with interest, and further, that he had taken *Schoonover's* notes for said purchase-money. Plaintiff avers that *Warren*, at the date of the sale, owed *Schoonover*, by promissory note, an amount larger than that of the notes given for said purchase-money, and that after sale of the lot, *Schoonover* entered a credit on the note which he held against *Warren*, for the amount of the notes, and interest thereon, given by him to *Warren* upon the sale of the lot, and *Warren* thereupon surrendered these notes to *Schoonover*, and then *Warren*, as administrator, made a deed to *Schoonover* for the property sold, viz., lot No. 136, in the west addition to the town of *Williamsport*, which deed was never confirmed by the Court. It is averred that *Schoonover* has never paid for the lot; that the purchase-money and interest, amounting to 200 dollars, remain unpaid. The prayer of the complaint is, that the plaintiff recover of *Schoonover* the 200 dollars, or that the sale of the lot be set aside, &c., and for general relief, &c. Defendant demurred to the complaint, but his demurrer was overruled, and he excepted. And thereupon he filed his answer, alleging that he had fully paid to *Warren*, the administrator, the aforesaid purchase-money and interest, &c. There was a reply in denial of the answer. Verdict for the defendant. New trial refused, and judgment.

In relation to the action of the Court upon the demurrer, the defendant has assigned a cross-error; hence, the first

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SCHOONOVER.

question to be considered relates to the sufficiency of the complaint. It is insisted that the plaintiff has mistaken his remedy—that he should have sued *Warren* and his sureties on his administration bond. We think otherwise. As a general rule, an administrator, upon a sale of his intestate's property, is not authorized to receive in payment anything other than money. Evidently, he has no power to apply the proceeds of the sale of the intestate's property in discharge of his own individual liabilities, because the exercise of such a power would be inconsistent with his prescribed duties as administrator, and would, in our opinion, be against public policy. And in this instance, the defendant is without excuse, because the facts alleged plainly show that he must have known that *Warren*, when he authorized the proceeds of the sale of the lot to be credited on his individual indebtedness, was acting in violation of his trust. Williams on Executors, 5 Am. ed., p. 841. It is true, upon the case made by the complaint, an action against *Warren* and his sureties could have been sustained on his administration bond. Still, the defendant having, in view of the alleged facts, made no legal payment upon his purchase of the lot, the remedy adopted by the plaintiff is not, in our judgment, misconceived.

The evidence being closed, the plaintiff moved the following instruction, which was refused, viz.: "That *James Schoonover* will not now be in a worse situation than he would have been had he paid the money for said lot, as he can yet file his claim against the estate of *Deloss Warren*, and get a judgment for the principal and interest of his said note, which he so gave up to *Warren*." In looking into the record, we are unable to perceive anything to which this instruction can be applied; hence, it was objectionable on the ground of irrelevancy, and, therefore, correctly refused.

The defendant, at the proper time, moved these instructions:

1. "The admissions of a party must be received with caution by the jury, and particularly so, when the witness can only give a part of the admissions.

2. "That a receipt for so much money is *prima facie* evidence of that fact, and will avail the party to whom it was given, unless overcome by more powerful and convincing proof."

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v.  
THE STATE.

The instructions thus moved were given by the Court, and the plaintiff excepted. The exception was not, in our opinion, well taken. The instructions, it seems to us, enunciate correct expositions of the law, and therefore the Court, in giving them, committed no error. See 1 Phil. Ev., Notes by Cowen, Hill and Edwards, p. 462.

The evidence is upon the record, and though it is, to some extent, conflicting, were of opinion that it authorized the jury to find the issue of payment in favor of the defendant.

*Per Curiam.*—The judgment is affirmed with costs.

*R. A. Chandler*, in person.

*J. H. Brown* and *J. Park*, for the appellee.

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APPEAL from the *Delaware* Circuit Court.

Tuesday,  
June 5.

PERKINS, J.—Prosecution for larceny. Conviction and sentence to the state prison.

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153	95

We have carefully looked through the record of this cause, and find no error which will reverse the judgment below.

Numerous questions are raised, which have been lately ruled in so many cases, that it cannot be necessary to restate them here.

A couple of points will be noticed:

The Court directed the witnesses to be separated. The defendant retained one of his witnesses in the house, whereby he heard the testimony of the others. The Court,

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v.  
BURNELL.

on that account, refused to allow him to testify. This cannot be held error. It was matter in the discretion of the Court. It was for the Court to hear, or refuse to hear, the witness, as seemed best justified by all the circumstances, and no error could be assigned on its ruling upon the point. Perk. Pr. 274.

The indictment charged the defendant with stealing two horses. It appears in evidence that he stole, with the horses, saddles and bridles. It was claimed that there was a fatal variance. This was a mistake. The proof established the stealing of the articles charged in the indictment. This sustained the prosecution. The omission to include in the indictment other articles, stolen at the same time, and forming a part of a single offense, was for the defendant's benefit (if it had any bearing upon the case.) It made the offense charged appear less aggravated than it really was, while the conviction or acquittal on the indictment as drawn, would bar another prosecution for the same larceny. The state cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime, bars any further prosecution based upon the whole or a part of the same crime. 2 G. and W. on New Trials, p. 55.

*Per Curiam*.—The judgment is affirmed with costs.

*D. Nation* and *C. M. Anthony*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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KELLEY v. BURNELL.

Tuesday,  
June 5.

APPEAL from the *Orange* Circuit Court.

PERKINS, J.—Suit upon a note. Judgment for plaintiff. The facts of the case are these:

*D. W. Rupert* sold a piece of land to *William Kelley* for 800 dollars, and purchased a pair of horses of *Robert Akey*

for 375 dollars. As a part payment for the land, *Kelley* gave his note to *Rupert* for 375 dollars, but made payable to *Akey*, which note *Rupert* delivered to *Akey*, who accepted it in payment for the horses sold above described. There is a dispute whether the note was given for a part of the consideration for the land, or for the horses, and the latter applied towards payment for the land.

May Term,  
1860.

KELLEY  
v.  
BURNELL.

*Akey* subsequently assigned the note to *Rupert*, and took back the horses, and *Rupert* assigned the note to *Burnell*, the plaintiff.

If the note was given in consideration of the horses, we are satisfied the sale of the horses was complete. The title and risk passed at the purchase and giving of the note, though, at the request of the purchaser, the seller agreed to keep the horses for the purchaser ten days, and, within that time, bought them back. Ind. Dig. 725.

If the note was given for the land, then we find nothing in the record showing a rescission of the contract, or a failure of title that will avoid the note. See *Small v. Reeves*, at this term (1).

According to numerous late decisions, it may be observed the specifications in the motion for a new trial were too vague to present questions to the Court below that have been argued in this Court.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*R. Parrett, J. E. McDonald, and A. L. Roache*, for the appellant.

*J. B. Howe*, for the appellee.

(1) *Ante*, 163.

May Term,  
1860.

LINE *v.* MACK and Others.

LINE  
*v.*  
MACK.

The statute laws of another state of the *United States* cannot be proved by parol. They must be evidenced by certified copies from the secretary of state, or by a copy printed by state authority.

The Court has a discretion as to the manner of proving statute laws of nations foreign to the *United States*.

Tuesday,  
June 5.

APPEAL from the *Grant* Court of Common Pleas.

PERKINS, J.—Suit upon a note. The note was executed, and made payable in *Ohio*, and was bearing interest at 10 per cent.

In the complaint on the note, a statute of *Ohio*, allowing 10 per cent. interest, was set out by copy.

Answer, in general denial.

On the trial, to prove the law of *Ohio*, the plaintiff offered in evidence a copy of Swann's Statutes of *Ohio*; but they were not certified by the secretary of state, nor did they appear to have been printed by the state printer. There was nothing showing that the copy of the statute offered in evidence was published by authority of the state of *Ohio*. But *Isaac Van Devanter*, over the defendant's objection, was permitted to testify that he believed the section of law, copied into the complaint, was the law of *Ohio*.

The Court gave judgment for plaintiff for the amount of the note and 10 per cent. interest.

The copy of Swann's Statutes was erroneously admitted in evidence. Perk. Pr. 275.

The testimony of Mr. *Van Devanter* was erroneously admitted for two reasons—

1. He was not shown to have been an expert in *Ohio* laws.

2. The statute laws of another state of the *United States* cannot be proved by parol. Perk. Pr. 276. They must be evidenced by certified copies from the secretary of state, or by a copy printed by state authority.

The statute laws of nations foreign to the *United States* stand on a different footing. Formerly, even they could



not be proved by parol. *Comparet v. Jernegan*, 5 Blackf. 375. But now the Court has a discretion on this point. May Term,  
1860.  
Perk. Pr. 276.

*Per Curiam*.—The judgment is reversed with costs. FARLEY  
v.  
FARLEY.  
Cause remanded, &c.

*J. H. Jones*, for the appellant.

*I. Van Devanter*, for the appellees.

THE COVINGTON DRAWBRIDGE COMPANY *v.* THE AUDITOR  
AND TREASURER OF WARREN COUNTY.

APPEAL from the *Warren* Court of Common Pleas. Tuesday,  
June 5.

*Per Curiam*.—The judgment in this case is affirmed upon the authority of *Adamson v. The Auditor, &c.*, 9 Ind. R. 174, the points arising in the record of each case being similar.

The judgment is affirmed with costs.

*R. A. Chandler*, for the appellants.

FARLEY *v.* FARLEY.

Where a party has waived the performance of a condition precedent, and especially where such waiver has been acted upon, the failure to perform cannot be insisted upon as a forfeiture.

APPEAL from the *Hamilton* Circuit Court.

DAVISON, J.—Suit by the appellant, who was the plaintiff, against her son, *Lewis Farley*. The case is this:

On the 27th of *June*, 1856, the parties entered into a written contract whereby the plaintiff agreed to convey to the defendant all her real and personal estate, in considera-

*Tuesday,  
June 5.*

May Term,  
1860.

FARLEY  
v.  
FARLEY.

tion that he, in and by the same contract, bound "himself and his heirs in the sum of 4,000 dollars to take care of her, *Nancy*, in sickness and in health, also to clothe and feed her during life; and further to support and maintain her daughter, *Mary Farley*, while she remained single; and to do the same on the old farm."

Contemporaneously with this contract, she executed a deed in this form: "I, *Nancy Farley*, of," &c., "convey and warrant to *Lewis Farley*, of," &c., "for the maintenance of said *Nancy* according to contract, the following real estate in *Hamilton* county [describing it]. In witness whereof, the said *Nancy* has hereunto set her hand and seal, this 27th of *June*, 1856. [Signed] *Nancy Farley* [seal]."

In the complaint it is averred that the land thus conveyed was of the value of 3,000 dollars; that upon the execution of the deed, she delivered to defendant possession of the real estate, and, at the same time, in pursuance of the agreement, delivered to him personal property worth 800 dollars.

On the 25th of *February*, 1857, the parties, in lieu of the contract of the 27th of *June*, entered into another written contract, by which plaintiff agreed to let all the property stand as it was by the former contract, except certain articles (naming them); and defendant, on his part, agreed to permit her to have said articles of property; also, to pay her, in lieu of the maintenance stipulated in the first contract, 40 dollars a year, to be paid on the 25th of *December* in each year, and seventy-five bushels of wheat each year, to be delivered to her on the first of *September*, and also twenty-five bushels of corn each year, to be paid at gathering time, and three hogs for her meat. It is further averred that when the latter agreement was executed, the parties expressly agreed, though not inserted in the writing, that defendant was then immediately to pay 40 dollars in money, twenty-five bushels of wheat, twenty-five bushels of corn, and three hogs, without the payment of which the whole contract was to be void. And plaintiff avers that he has utterly refused to pay said last-mentioned money and articles of property, or any part thereof.

The relief prayed is, that plaintiff's conveyance to defendant be set aside, &c.; that an account be taken of the rents, &c., also of the personal property delivered by her to the defendant, and for general relief, &c.

May Term,  
1860.

FARLEY  
v.  
FARLEY.

The issues were submitted to a jury, who found a special verdict, which is substantially as follows: "That defendant had not failed to comply with the stipulations in either of the above written instruments on his part to be performed; that at the time of the execution of the second written agreement, viz., on the 27th of *February*, 1857, it was, as part thereof, verbally agreed by the parties that defendant was then immediately to pay the plaintiff 40 dollars in money, twenty-five bushels of wheat, twenty-five bushels of corn, and three hogs—of which he has paid 4 dollars, 56 cents, in money, two bushels of wheat, ten bushels of corn, and all the hogs, leaving a balance unpaid of money 33 dollars, 33½ cents, of wheat worth 27 dollars, 80 cents, and corn worth 5 dollars, 46 cents—making, in the aggregate, 63 dollars, 53 cents. The jury also found that the parties, after the 25th of *February*, 1857, were governed by the second agreement; that defendant had possession of the land conveyed, receiving the rents and profits for fifteen months, worth 300 dollars, and that he supported and maintained the plaintiff and her daughter eight months, up to *February* 25, 1857.

Upon this verdict, the Court, having denied a motion for a new trial, rendered judgment in favor of the plaintiff for 66 dollars, 53 cents, and she appeals to this Court.

As has been seen, the jury found that the parties, after the 25th of *February*, 1857, the date of the second agreement, were governed by it. Hence, it must be presumed that the time of the delivery of the money and property, as stipulated by the verbal contract, was waived by the plaintiff. She cannot, therefore, insist upon the defendant's failure to pay the money, &c., immediately upon the execution of the second agreement, as having worked a forfeiture of the estate. We are of opinion that the special verdict authorized the judgment; and further, that the evidence set out in the record sustains the verdict.

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1860.

MORRIS  
v.  
STEWART.

Various errors relative to instructions refused, and to the charge given, are assigned upon the record, but they will not be noticed, because the judgment rendered seems to be consistent with the special verdict, and that verdict is right on the evidence.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*G. H. Voss*, for the appellant.

*E. S. Stone*, for the appellee.

14 334  
139 287

### MORRIS v. STEWART and Others.

Where the land of a person is sold at guardian's sale, though the record does not show such person to have legally been made a party, still if there had been a reception of the purchase-money, and such acquiescence as amounts to an equitable estoppel, the record may be given in evidence, upon a suit to recover possession of the land, as a link in the chain necessary to make out the defense.

Wednesday,  
June 6.

### APPEAL from the *Rush* Circuit Court.

HANNA, J.—*Catherine Morris*, on the 8th of *August*, 1855, filed her complaint praying a partition of the west half of the north-west quarter of section twenty-six, of township thirteen north, of range nine, of which she averred she was, by descent from her father, *John Litteral*, the owner in fee simple of the one undivided ninth part; and that the said *Stewart* was the owner of the other eight-ninths, and in possession of said lands.

*Stewart* answered, first, in denial; second, that *John Litteral* died some time previous to 1835, seized of said tract of land; and that on the 19th day of *December* of that year, by order of the Probate Court of *Rush* county, said land was sold upon the petition of the guardians of the minor heirs of said *Litteral*, said plaintiff being at that time one of said minor heirs; that one *Nelson* became the purchaser, who is made a party, &c. The record of the ap-

plication, sale, and confirmation, &c., are set out at length in the paragraph.

May Term,  
1850.

One of the main questions in the case is, whether the plaintiff in this case was a party to that proceeding. The portion of the petition of the guardian necessary to notice, in that connection, is as follows: "Guardian of the persons and estate of *Samuel Litteral* and *Jonathan Litteral*, infant heirs at law of *John Litteral*, late of *Rush* county, deceased, over the age of fourteen years, and of the persons and estate of *John Litteral*, *Adam Litteral*, *Jackson Litteral*, *Betsey Litteral*, and *James Litteral*, infant children, &c., under the age of fourteen years. Your petitioners would further represent that *John Litteral* died seized of the west half of the north-east quarter of section twenty-six, township thirteen, range nine; that said eighty acres of land descended to the above-named heirs at law for whom your petitioner is guardian, together with *Catherine Litteral* and *Nancy Litteral*, also heirs at law of said *John*."

MORRIS  
v.  
STEWART.

The answer avers that said *Catherine* received of said guardian her distributive share of the money arising from the sale of said land, and directed that a commissioner be appointed to convey the same. A receipt by the husband of said *Catherine* for said money, and directing, &c., is set forth in said answer; and it is averred that defendant made improvements of great value, and that plaintiff, for nineteen years and eight months, stood by, living all the time in the neighborhood, and saw defendant in possession, believing he had a perfect title, and that she never asserted any title, but concealed the same, knowing that he was wholly ignorant thereof.

The third paragraph of the answer is, that, on the 19th of *December*, 1835, the plaintiff and her husband sold their interest in the land to *Nelson*, received the full consideration therefor, put him in possession, had stood by, &c., and were now in equity bound to make defendant a deed; that the husband of said plaintiff died on the 29th of *June*, 1851, insolvent.

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1860.

MORRIS  
V.  
STEWART.

*Fourth.* The statute of limitations, to-wit, that said land was sold on a judgment of a Court directing the sale thereof, to which plaintiff was a party, and that more than five years had elapsed, &c.

*Nelson's* answer was in substance the same.

Reply, first, a denial; second, that on the 19th day of *December*, 1835, plaintiff was an infant and married, and had no guardian; that neither she nor her husband had any notice of said proceedings; that her husband died as alleged.

Trial by the Court; finding and judgment for the defendants. The evidence is in the record.

Among other items of evidence admitted, was the record pleaded, as also the record, &c., of the final report of the guardian of the minor heirs, naming said plaintiff among them, of *John Litteral*, and the objections or exceptions filed thereto by certain persons naming themselves heirs of said *John*, and wards of said guardian, among them the said *Catherine*, together with her husband. It was admitted on the record that said lands had sold for their full value, and possession of the whole was taken; that she had some knowledge of the sale of said lands, in 1837, and that her husband had received some money from her father's estate. It was proved by parol that soon after the sale in 1835, she had spoken of the said sale; and knew the land had been sold, and that her husband had received money from said estate, but from what source derived, it is not shown that she had knowledge; and that she knew that *Stewart* claimed to be the owner of the land for eighteen years; that she was married in 1835, at the age of seventeen, to *Morris*, of full age, and removed to *Hendricks* county, where they remained until 1846, when they removed to within four or five miles of the land, where they remained until the death of her husband, in 1851; since that time she has resided in the immediate neighborhood of the land, and had not been heard by the witnesses (her sister and brother-in-law) to assert title until about the time suit was commenced.

The errors assigned are, first, in admitting evidence; second, in refusing a new trial.

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1860.

The first item of evidence of defendants, namely, the record of the sale, &c., of said land, was objected to for two reasons; first, the Court had no jurisdiction of the present plaintiff; second, nor was the land, &c., the same now in controversy.

MORRIS  
V.  
STEWART.

As to the first objection, we do not think it was distinctly shown by the pleadings, in the application to sell the land, that the applicants were the guardians of the present plaintiffs. It is asserted in the answer in this case that they were, and not only denied by the reply, but it is therein further asserted that she was then a minor and married. If these were all the averments in the complaint herein, we do not think the record offered in evidence should have been admitted. But it is further averred that she received her distributive share of the money arising from the sale, and that she stood by, &c., from the time of such sale. It was, therefore, perhaps, necessary to introduce that record as the best evidence of the amount derived from such sale, and the date thereof. The purpose for which it was introduced is not shown.

As to the next objection. The land described in the petition of the guardian, and in the recital in the commissioner's deed, is not the same as that described in the complaint herein; but the latter description corresponds with the return of the appraisers, the notice of sale, the report of the commissioner, and the granting part of the deed of said commissioner, in the former proceeding. The decree or order of sale of the property does not describe it. We think, under these circumstances, the objection was not well taken. The record was properly admitted, in the first instance, as a link in the chain of testimony; especially as before it was offered, by the admissions of the plaintiff, it appeared that the land was sold at public sale, and it was believed to be all that belonged to *Litteral* at his death, and was taken possession of by the purchaser, and that the plaintiff had some knowledge of such sale. The parol evidence completed the chain by showing that there

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1860.

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MORRIS  
V.  
STEWART.

was but the one piece of land of which said *Litteral* was the owner. *Doe v. Smith*, 1 Ind. R. 451.

The second item of evidence, namely, the record of the report, &c., of the guardian, was objected to; but the testimony was relevant upon the issue made as to whether the plaintiff had received a distributive share of the proceeds of the sale. That report, together with the voucher accompanying it, tended to prove that fact; for it is conceded by the appellant that, under the law then in force, the husband could receive the distributive share of the wife. See 1 Ind. R. 452. Perhaps it was also admissible under the issue made as to whether the present plaintiff was a ward of said guardian. This record shows her and her husband appearing in that character, and objecting to such report.

The second assignment of errors is based upon the alleged insufficiency of the evidence.

The finding of the Court is general, and we are not, therefore, informed upon which of the issues it is based, or whether upon all. If from the evidence the Court found that the present plaintiff was a party to the proceedings to sell, in 1835, it would follow, if such finding is sustained, that, under the issue on the fourth paragraph of the answer, the principles laid down in the case of *Vancleave v. Milliken*, 13 Ind. R. 105, would apply; and, consequently, the plaintiff would be barred by the statute. More than five years from the confirmation of the sale, and two from the removal of the disability, had elapsed.

But to the question of the sufficiency of the evidence. Much of the argument of each party is devoted to the question of whether the acts, and the failure to act, of the plaintiff, now precludes her from maintaining this suit. The facts upon which the arguments are based are, that the sale was made in 1835, of which it is shown she had notice soon afterwards; that her husband received a part of the money, as due her, arising from that sale; that for eighteen years she knew *Stewart* had possession under the purchase, claimed title, and was making improvements; that for a considerable portion of that time, she was near



to the said *Stewart*, but set up no claim to said land; that as late as 1851, at the settlement of the guardian of the heirs of *Litteral*, she and her husband resisted that settlement, and, by the exceptions filed, she treated him as her guardian, but did not question the propriety or legality of the sale of said lands by him.

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1860.

DAILY  
V.  
NUTTMAN.

The evidence, which we have already determined was properly introduced, tended to establish these points so as to preclude us from disturbing the finding thereon, upon that ground, under our repeated decisions.

The Court must have found that, for these causes, the plaintiff was estopped to now claim title, or else that she was a party to the proceedings upon the application. In either event, we do not see but that such finding is, under the circumstances, conclusive upon us.

*Per Curiam*.—The judgment is affirmed with costs.

*A. W. Hubbard* and *L. Sexton*, for the appellant.

*G. C. Clark* and *P. A. Hackleman*, for the appellees.

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DAILY and Others v. NUTTMAN.

14	339
170	540

APPEAL from the *Adams* Court of Common Pleas.

Wednesday,  
June 6.

WORDEN, J.—Suit by the appellee against the appellants on a note made by them to one *Hannah Catterline*, and by her indorsed to the plaintiff.

An answer of four paragraphs was filed by the defendants, the last one of which was rejected on the plaintiff's motion. Replication in denial of the other paragraphs.

Trial; verdict and judgment for the plaintiff, over a motion made by the defendants in arrest of judgment, and for a new trial.

The rejection of the fourth paragraph of the defendants' answer is assigned for error. That paragraph is nearly the same in substance as the third. The facts set up in the fourth, we think, without doubt, could have been given in

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1860.

PASCHAL  
v.  
SMITH.

evidence under the third; hence, no error was committed in rejecting it which should reverse the judgment. Ind. Dig. p. 658, § 253, and authorities there cited.

Error is also assigned upon the admission of testimony and the instructions of the Court. If error was committed in either of these respects, it was necessary to move for a new trial on that ground. Without such motion, the defendants cannot avail themselves of the error. *Kent v. Lawson*, 12 Ind. R. 675. The previous motion in arrest of judgment cuts off the motion for a new trial, and affirms the verdict. Ind. Dig. 593. No reason is shown why the judgment should have been arrested.

*Per Curiam*.—The judgment is affirmed with 2 per cent. damages and costs.

*W. W. Carson*, for the appellants.

*D. Studabaker* and *W. March*, for the appellee.

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PASCHAL v. SMITH and Others.

Wednesday,  
June 6.

APPEAL from the *Randolph* Court of Common Pleas.

*Per Curiam*.—This case was submitted to the Court for trial, who found for the plaintiffs below. And the only error assigned relates to the sufficiency of the evidence to sustain the finding of the Court. We have carefully examined the evidence, and perceive no reason why the finding should be disturbed.

The judgment is affirmed with 5 per cent. damages and costs.

*W. J. Peelle*, for the appellant.

*J. Smith*, for the appellees.

## HAYS v. WEATHERMAN.

May Term,  
1860.HAYS  
v.  
WEATHER-  
MAN.

14	341
166	366

Where a person purchases property, and is to have a delay of payment upon executing his notes, if he fails to execute his notes the purchase-money is due immediately.

APPEAL from the *Sullivan* Court of Common Pleas. *Wednesday, June 6.*

DAVISON, J.—This was an action by *Hays* against *Weatherman*. The complaint alleges that the plaintiff, on the 15th day of *November*, 1856, sold and delivered to defendant two yoke of oxen, for which he agreed to pay 120 dollars, in two equal payments, viz., one payment on the 25th of *December*, next following the date of the sale, and the other by the first of *May*, 1857. And to secure these payments, defendant agreed to execute two several promissory notes, each for the payment of 60 dollars. It is averred that defendant, though often requested, has neglected and refused to execute the notes, and has, also, refused to pay said purchase-money, or any part of it.

Issues being made, the cause was submitted to a jury, who found for the plaintiff 61 dollars, 35 cents. New trial refused, and judgment. The evidence shows the sale of the oxen, as stated in the complaint, in *November*, 1856; that the consideration was 120 dollars, one-half to be paid on the first of *January*, 1857, and the residue on the first of *May*, then next following. And there was evidence tending to prove that defendant, as part of the contract of sale, stipulated that he would execute two promissory notes for the purchase-money, which was not done.

This suit was commenced *February* the 10th, 1857. At the proper time the plaintiff moved this instruction: "If the jury find that the defendant, when he bought the oxen, agreed to execute to the plaintiff his notes for the purchase-money, and has failed to do so in a reasonable time, a right of action accrued to the plaintiff." The Court refused to so instruct the jury, and plaintiff excepted.

This exception was well taken. The defendant having received the property, and having failed to execute the

May Term,  
1860.

STEVENS  
v.  
SONGER.

notes, as stipulated in the contract of sale, was not entitled to the proposed delay of payment. He became at once liable for the price of the oxen, as agreed on by the parties. Indeed, the rule is well settled, that "where goods are sold on a credit that are to be paid for at a future day, and it is part of the contract of sale that a note shall be given immediately, which is to be payable on that future day, if such note be not given, an action can be maintained for not giving the note, and the measure of damages is the full price of the goods." 2 Pars. on Cont. 486, 487, note *k*, and cases there cited.

This exposition is no doubt correct, and the result is, the instruction was pertinent to the case, and should have been given. Its refusal was error, and the judgment must, therefore, be reversed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. P. Usher* and *S. Coulson*, for the appellant.

*W. G.* and *F. L. Neff*, for the appellee.

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STEVENS v. SONGER.

Where *A.* sells property to *B.*, and *B.*, by agreement, executes his notes to *C.*, the latter is entitled to sue on the notes; and *B.* will not be allowed to set up the want of interest in the note of *C.* at the time it was executed.

Wednesday,  
June 6.

APPEAL from the *Rush* Court of Common Pleas.

WORDEN, J.—*Songer* sued *Stevens* on a promissory note, made by the latter to one *Caleb Holding*, and by *Holding* indorsed to the plaintiff.

The defendant answered in three paragraphs, to all of which demurrers were sustained, and final judgment was rendered for the plaintiff. The rulings on the demurrers present the only questions for decision here.

The first paragraph of the answer admitted the making

of the note, and that it was unpaid, and did not profess to set up any facts in avoidance. The demurrer to this was correctly sustained.

May Term,  
1860.

STEVENS  
V.  
SONGER.

The second paragraph avers, in substance, that the note was given for property of one *Peter Songer*, and was made payable to *Holding* by order of said *Peter*, for the fraudulent purpose of preventing, hindering, and delaying the creditors of said *Peter*, in the collection of their debts; that *Holding*, without consideration, and by the direction of said *Peter*, assigned the note to the plaintiff, who is the nominal holder thereof, but that the note, and the whole interest therein, is the property of the said *Peter*, and that plaintiff holds the same for the fraudulent purpose of hindering, &c., the creditors of said *Peter*. The paragraph further alleges that, since the execution of the note, he has purchased divers notes against said *Peter*, describing them, which were executed before the note sued on, and offers to set them off against the note in suit.

The third paragraph is, in substance, the same as the second, averring the purchase by the defendant of an account against said *Peter*, which is sought, in like manner, to be set off.

These paragraphs, we think, were insufficient, and the demurrers to them properly sustained.

Leaving out of view any question of fraud, *Peter Songer* had the right to have the note made payable to *Holding*; and as between *Peter* and *Holding*, although fraudulent, the interest in the note would be in *Holding*. The defendant having consented to give his note to *Holding*, he cannot now say that he did not thereby become the debtor of *Holding*. As a debtor, he is estopped by his own act in giving the note, from saying that he became liable to *Peter Songer* and not to *Holding*. The creditors of *Peter Songer* might be placed in a different situation. They might, in a proper case, reach the property thus fraudulently transferred, or perhaps the note in the hands of the defendant. And perhaps, in a proper case (though upon this point we decide nothing), the defendant might, by purchasing claims against *Peter*, and thereby placing him-

May Term,  
1860.

VAIL  
v.  
HALTON.

self in their shoes, and entitling himself to the rights of a creditor, reach the debt in his own hands, as is sought to be done in this case. But in doing so he would be entitled to no greater rights than he would as a creditor seeking to make his money out of the property transferred, or the note. In such case, he would be required to exhaust the other property of *Peter*, or show that he was insolvent, before proceeding to reach the property thus fraudulently transferred, or the proceeds. *Law v. Smith*, 4 Ind. R. 56. The paragraphs under consideration are fatally defective, if for no other reason, because they do not allege the insolvency of *Peter Songer*, nor show but that he has property subject to execution, sufficient to pay the debts that are offered to be set off.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*L. Sexton*, for the appellant.

*G. C. Clark* and *P. A. Hackleman*, for the appellee.

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### VAIL and Others v. HALTON and Others.

14	344
156	621
156	623
14	344
156	612

*Vancleave v. Milliken*, 13 Ind. R. 105, followed.

In a suit for the recovery of real estate, all legal or equitable defenses, by the act of 1855, may be given in evidence under the general denial.

Where a person claims the benefit of an exception in the statute of limitation, he must show that he comes within it.

Wednesday,  
June 6.

APPEAL from the *Fayette* Circuit Court.

WORDEN, J.—Action by the appellants against the appellees, to recover possession of certain real estate. Answer in denial. Trial by the Court. Finding and judgment for the defendants, a new trial being denied.

On the trial, it was admitted that in *April*, 1840, *John Allen* died seized in fee simple of the premises in controversy, and that the plaintiffs are his heirs at law. The defendants introduced the record of the Probate Court of

*Fayette* county, by which it appears that the administrator of *Allen* procured an order of that Court for the sale of the land, for the payment of the debts of the estate of the deceased; and that, in pursuance of the order, he sold the same to one *George Frybarger*, which sale was afterwards confirmed, and a conveyance ordered to be made to the purchaser, which was done. These proceedings were closed up at the *February* term of the Court, 1844. It was admitted that the defendants were in possession of the property, claiming title under *Frybarger*; that *Frybarger* took possession soon after the sale, and that he, and those claiming under him, have been in the possession ever since.

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1860.

VAIL  
V.  
HALTON.

The appellants insist that the proceedings of the Probate Court, owing to irregularities and defects therein, are a nullity, and that no title passed thereby to *Frybarger*. On the other hand, the appellees claim that, though the proceedings be invalid for the purpose of vesting in the purchaser a title to the premises, yet that they gave a color of title which is protected by the statute of limitation, in reference to suits for the recovery of lands sold by executors and administrators. This point is settled in favor of the appellees, by the case of *Vancleave v. Milliken*, 13 Ind. R. 105.

The statute of limitations, or any other legal or equitable defense, can be given in evidence under the general denial, without pleading it specially, in actions for the recovery of real estate. Acts of 1855, p. 57.

By the statute of limitations, persons being under disabilities when the cause of action accrues, have two years within which to bring the action, after the disability is removed.

If, in this case, the plaintiffs were under any disability when the cause of action accrued, and if the suit was brought within two years after the disability was removed, the proof devolved upon them to show it. The action was not brought until 1856, twelve years after the sale of the land, and the action is *prima facie* barred. If the plaintiffs were infants at the time the cause of action accrued, they

May Term, 1860. should have shown at what time they became of age, and that the suit was brought within two years thereafter.

JONES v. THE STATE. There being no proof on this subject, we must affirm the judgment.

*Per Curiam.*—The judgment is affirmed with costs.

*J. A. Fay* and *N. Trusler*, for the appellants.

*J. S. Reid*, for the appellees.

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### JONES v. THE STATE.

A prosecution for knowingly receiving stolen goods, must be commenced within two years from such reception.

Wednesday,  
June 6.

APPEAL from the *Shelby* Circuit Court.

DAVISON, J.—Prosecution for receiving a stolen mare, knowing her to have been stolen. The indictment, which was the commencement of the prosecution, was found *October* the 12th, 1859. The charge is, that *Joseph Jones, Joseph J. Jones, Richard Jones* and *Henry Quinn*, on the 15th of *February*, 1858, at *Shelby* county, one black mare of the value of 100 dollars, of the personal property of one *George W. Mounts*, did then and there feloniously receive and conceal—the same mare having been then and there and theretofore feloniously stolen, &c.—they, the said *Joseph, Joseph J., Richard, and Henry*, then and there well knowing the said mare to have been so stolen, &c. The appellant, *Joseph Jones*, was allowed a separate trial, which resulted in a verdict of guilty. Motions for a new trial and in arrest were denied, and judgment rendered on the verdict.

The evidence proves that the mare was stolen on the 3d of *September*, 1856, and was in the defendant's possession on the 15th of the same month, and remained continuously in his possession up until *March*, 1859, when she was claimed by *Mounts* as his property. As has been seen, this



prosecution was commenced *October* 12, 1859, more than two years after the defendant received the stolen property, and was, consequently, barred by the statute of limitation, unless, as contended by the state's attorney, "the offense of receiving stolen goods is a continuing offense, and each day's possession is a new, or continued reception." We are not, however, inclined to adopt this position. The offense was complete when the defendant received the mare, knowing her to have been stolen. It was then committed, and the statute is, that for such offense the prosecution must be commenced within two years after its commission. 2 R. S. p. 363, § 12. To constitute this offense, the property must have been stolen, the party charged must have received it, and at the time it was received have known it to have been stolen. There must, then, as an element of the offense, be an actual reception of the stolen property. This evidently could not occur where the property, after its reception, continued in the possession of the party who received it. We are of opinion that the statute of limitation commenced running, in this case, in *September*, 1856, when the defendant received the stolen mare, and therefore continued to run. It follows, this prosecution, not having been commenced until the 12th of *October*, 1859, is barred by the statute.

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1860.

COBURN  
v.  
DODD.

*Per Curiam.*—The judgment is reversed with costs, Cause remanded, &c.

*J. W. Gordon* and *J. A. Beale*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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COBURN v. DODD, Auditor of State.

APPEAL from the *Marion* Circuit Court.

Wednesday,  
June 6.

*Per Curiam.*—*Coburn*, as judge of the Court of Common Pleas of the county of *Marion*, on the 16th day of

May Term,  
1860.

COBURN  
v.  
DODD.

*May*, 1860, applied to the defendant, as auditor of state, to audit and allow his claim for six months' salary, under the act of 1859, entitled "An act to amend the third section of an act entitled 'An act to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for, the judges thereof,' and repealing sections 29 and 38 of said act." Acts of 1859, p. 91.

The defendant refused to audit and allow the claim, and proceedings were instituted in the Circuit Court to compel such allowance, which resulted in a judgment for the defendant.

The plaintiff appeals to this Court, where two questions are raised:

1. Is the act, the title of which is above set out, valid?
2. If so, does it entitle the appellant to the salary claimed?

In reference to the first question, it is claimed that the act is void, as not having been enacted in accordance with the requirements of the constitution.

Upon a reference to the journals of the legislature, and to the history of the bill as shown thereby, we are satisfied that it went through all the constitutional forms of legislation, and that it is a valid law.

But the second question must be determined against the plaintiff. The salary provided for in the act in question, is not to be paid until the judges are elected, commissioned, and qualified, as provided for in the same act; and besides this, it is payable out of the county, and not the state treasury. The judgment, therefore, must be affirmed.

HANNA, J.—Believing that the answer of the governor, in response to the resolution of the senate, was not in fact, nor intended to be, a veto, I concur in the above conclusion.

The judgment is affirmed with costs.

*S. Yandes* and *J. Coburn*, for the appellant.

*J. E. McDonald*, Attorney General, for the appellee.

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1860.14 349  
125 517

## BALES v. WEDDLE.

BALES  
v.  
WEDDLE.

Where a party to a contract treats it as unrescinded, and sues for a breach of it, he must set out the instrument, or a copy, as the foundation of his action. *Aliter*, where he treats it as rescinded, and sues to recover back money paid under it.

If a party sells personal property, as a lot of hogs, to be delivered at a future time, it seems he may go into the market and buy them for delivery under the contract; but if, at the time of the contract, he represents that he then has the property on hand, and thereby obtains an advance of money thereon, when, in fact, he has not the property on hand, it is a fraud which will justify a rescission of the contract.

APPEAL from the *Hendricks* Court of Common Pleas. *Wednesday, June 6.*

WORDEN, J.—Suit by *Weddle* against *Bales*. The complaint contains three paragraphs. The first is for money had and received generally. The second alleges, in substance, that the plaintiff paid to the defendant the sum of 800 dollars (which he seeks to recover back), upon the following contract, entered into between them, viz.:

“This is to certify that I have this day sold to *Aaron Weddle*, 200 hogs, to be good, merchantable, corn-fatted hogs, to weigh two hundred pounds and over, for four dollars per hundred weight gross, and to be weighed at *E. Bales*’, between the 25th of *November* and the 5th of *December*, 1857; and in consideration of which, I receive 200 dollars in hand, and am to receive 600 dollars more the 15th of *April*, drawing 10 per cent. interest until the hogs are weighed, when I am to receive the balance. *March 5th*, 1857. [Signed] *Eden Bales*.”

It is alleged that the defendant, at the time of making the contract, falsely and fraudulently represented to the plaintiff that he had on hand, and in his possession, the two hundred hogs, whereby the plaintiff was induced to make the payments aforesaid, whereas the defendant had not, at the time of making the contract, two hundred hogs, nor any part thereof, wherefore the contract was void; that the plaintiff has requested the defendant to return the money, which he fails and refuses to do; wherefore, &c.

The third paragraph alleges the like payment upon the

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1860.

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BALES  
v.  
WEDDLE.

contract, averring that the defendant, between the 25th day of *November* and the 5th day of *December*, 1857, had not two hundred hogs of the kind and description mentioned in the contract, and, therefore, could not comply with the terms thereof; nor did he ever weigh out to the plaintiff said hogs, and although the plaintiff requested the delivery thereof, according to the terms of the contract, the defendant wholly failed and refused them, wherefore he has received no consideration for the money thus paid; that he has demanded the same, but the defendant refuses to pay; wherefore, &c.

Demurrers were filed to the second and third paragraphs of the complaint, which were overruled by the Court, and the defendant excepted. Answers were filed and issues formed, and the cause tried by the Court. Finding and judgment for the plaintiff, a new trial being refused.

The ruling of the Court upon the demurrers is, amongst other things, assigned for error.

The objection made in the brief of counsel for the appellant, to the paragraphs demurred to, is that neither of them contains the allegation that *Weddle* was ready, or offered to comply with his part of the contract. Were the paragraphs based upon the written contract, perhaps such allegation would be necessary. See, however, *Boyle v. Guysinger*, 12 Ind. R. 273. But we do not regard the paragraphs as counting upon the written agreement, and seeking to recover damages for its non-performance by the defendant. They are special counts to recover the money paid by the plaintiff upon the contract. They treat the contract as rescinded, and go for the money paid on it, and do not treat the contract as in force, and seek damages for its breach by the defendant. Hence no allegation that the plaintiff performed, or was ready and willing, or offered to perform his part of the contract, could be at all necessary, if the facts set up were sufficient to authorize the plaintiff to treat the contract as void, or as rescinded.

There are two allegations in the second paragraph, that seem to require some notice. First, that at the time of making the contract, *Bales* had not the hogs, nor any por-

tion of them; and, second, his fraudulent representation that he had them.

May Term,  
1860.

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BALES  
v.  
WEDDLE.

In *Bryan v. Lewis*, 21 E. C. L. 467, it was held "that if a man sell goods to be delivered at a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods which he has contracted to deliver, he cannot maintain an action upon such contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences." But this doctrine was entirely overturned in the later case of *Hibblewhite v. McMorine*, 5 M. and W. 462, Barons PARKE, ALDERSON and MAULE, each delivering an opinion. MAULE, B., remarks: "I always considered the doctrine laid down in *Bryan v. Lewis*, as contrary to law, and most inconvenient in practice; and I have often heard it spoken of with great suspicion, both by lawyers and mercantile men, upon both grounds, as against law, and against all mercantile convenience."

A distinction may be taken between contracts by which one person agrees to sell to another, at a future day, property not professed to be then owned by the seller; and those contracts which purport to sell property then owned by the seller, to be delivered at a future day. Perhaps the one class of contracts might be good, and the other void, where the property, the subject of the contract, was not owned by the vendor at the time of the contract.

The case of *Mason v. Cowans*, administrator, 1 B. Mon. 7, involves the construction of a contract as to what was intended to be sold. The contract specifies that "*James F. Mason* has bought of *William C. Cowan*, all the hogs that he may have for market next fall, to be delivered about the 25th or 30th of *October*; the hogs to average, &c., and be in number about one hundred, more or less." The Court say: "The contract, in our judgment, clearly points to, and was intended by the parties to embrace the hogs fattened and prepared for market by *Cowan*, and not

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1860.

BALES  
v.  
WEDDLE.

those that might be bought by him, that had been fattened and prepared for market by others."

In *Alexander v. Dunn*, 5 Ind. R. 122, the contract was as follows:

"*Gosport*, October 5th, 1847. We this day agree to receive from *Samuel F. Dunn*, between fifty-five and seventy-five pork hogs, to be delivered to us in our pork-house in *Gosport*, net, for which we agree to pay him three dollars per hundred pounds net—said hogs to be delivered in the month of *December*. The money to be paid on the delivery of the hogs. [Signed,] *W. D. Alexander & Co.*"

The Court say: "It is well settled that *Dunn* could not purchase hogs to fill the contract. The hogs purchased by *Alexander*, were the hogs owned by *Dunn* at the time the contract was made. If *Dunn* did not then own a sufficient number which could, at the time of delivery, be made to meet the average weight required, *Alexander* was released." The case in *B. Monroe, supra*, is cited in support of the position.

If the case of *Alexander v. Dunn* gives a correct exposition of the contract in that case, and the law as applied to it, it is decisive of the point under consideration. But we do not choose to determine the case upon the ground that the contract was void, simply because *Bales* did not own the hogs at the time of the contract. There is an element in the case that renders it unnecessary for us to express any opinion upon this point. *Vide Wright v. Blachley*, 3 Ind. R. 101. We are of opinion that the false and fraudulent representations made by the defendant, as charged in the paragraph under consideration, that he had the hogs on hand and in his possession, whereby he intended the plaintiff to pay the money on the contract, was such a fraud as vitiated the contract, and entitled the plaintiff to treat it as void, and sue for the money thus paid. *Weddle* might well be conceived to have been willing to contract with *Bales* for the hogs which he supposed *Bales* had on hand, fitting for the market next fall, at a given price, and to make advances thereon, when he would have refused to make any such contract or advances, had

he known that *Bales* had not the hogs, but expected to purchase them in order to discharge the contract. We are of opinion that the demurrer was correctly overruled as to the second paragraph of the complaint.

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1830.

BALES  
V.  
WEDDLE.

The third paragraph is clearly good, and the demurrer to it correctly overruled. That alleges that, at the time the hogs were to have been delivered, the defendant had not the hogs, and could not comply with the contract. Mr. *Chitty* says: "If neither party be ready at the appointed time, and both are in default, the contract seems to be at law *ipso facto* dissolved, and the deposit is recoverable, unless the time has been prolonged by consent." Chit. on Cont., 310. Again, at p. 622: "Where money has been deposited or paid on a contract, and before any benefit has been derived by the payor, or any part of the contract has been performed by the other party, the consideration wholly fails, an action may be maintained upon the common count to recover back the amount. Thus, if the purchaser of an estate, &c., by auction or private contract, pay a sum of money as a deposit, or in part of the purchase-money, and a good title cannot be made out according to the contract, the money may be recovered back upon the common count. It is also sustainable in such case, if neither party is ready to complete the contract at the stipulated time, and each party is in default."

We have already seen that the second and third paragraphs are for the recovery of the money paid on the contract, setting out the facts more specially than is done in the ordinary common count.

The motion for a new trial, we think, was correctly overruled. The evidence shows that both parties were in default, and that neither could have maintained an action on the contract. *Bales* did not have the hogs weighed for *Weddle*, nor does it appear that he ever offered to perform the contract on his part, or was ready to perform it. Indeed, from the evidence, it is doubtful whether he had a sufficient number of the kind and description of hogs to discharge the contract. The testimony has a tendency to show that the contract was somewhat modified, and the

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1860.

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v.  
JONES.

time for the delivery of the hogs prolonged; but *Bales* does not appear to have performed, or offered to perform his part of the contract, within the prolonged time, or afterwards. *Weddle* offered and gave evidence that, after the time for the delivery of the hogs, he demanded them, and offered to pay for them according to the contract. To the introduction of this evidence, *Bales* excepted. Suppose this evidence were stricken out as incompetent, there is still enough left to abundantly sustain the finding. The plaintiff having proven the payment of the money, and both parties being in default, and no action being maintainable by either upon the contract, the plaintiff was entitled to recover back the money thus paid. In addition to the authorities already cited, the case of *Harris v. Bradley*, 9 Ind. R. 166, is directly in point. The Court say: "This, then, is a case in which both parties are in default. Neither could have maintained an action upon the agreement, and it must, therefore, be held rescinded. The result is, that the plaintiffs were entitled to recover on the paragraph for money had and received."

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*C. C. Nave* and *J. Witherow*, for the appellant.

*H. C. Newcomb*, *J. S. Tarkington*, and *L. M. Campbell*, for the appellee.

14	354
148	62
14	864
150	248
14	354
164	50

### BOYER v. JONES and Another.

Sections 3 and 83 of the act to provide for the assessment of taxes in *Indiana*, found in 1 R. S. p. 105, are constitutional.

Wednesday,  
June 6.

APPEAL from the *Warren* Circuit Court.

WORDEN, J.—Action by the appellant against *Jones*, as auditor, and *Harris*, as treasurer of *Warren* county, to restrain them from the collection of a certain tax and pen-



alty assessed against him, upon property described in the complaint, as follows, viz.: "The amount of the share of the plaintiff, which he had in the estate of his mother, then deceased, and who resided in the city of *Philadelphia*, and state of *Pennsylvania*, and which consisted in bank stock and money at interest in said city of *Philadelphia*, and which said bank stock and securities for money at interest have never been in the state of *Indiana*." It was claimed that the property was not subject to taxation in this state.

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1860.

BOYER  
v.  
JONES.

A demurrer was sustained to the complaint below; and the plaintiff excepted, and appeals to this Court.

The act to provide for the valuation and assessment of real and personal property, &c., contains the following provisions:

"SEC. 3. All real property within this state, and all personal property owned by persons residing within this state, whether it is in or out of the state, and all personal property within this state owned by persons not residing within this state, subject to the exceptions hereinafter stated, shall be subject to taxation. \* \* \*

"SEC. 5. The terms 'personal property,' as used in this act, shall be construed to include \* \* \* all moneys at interest, whether within or without the state; all public stocks, *Indiana* state stocks, stocks of other states and the *United States*, stocks in all railroads, plank-roads, &c., and in all moneyed and stock corporations, whether within or without this state." 1 R. S. p. 105.

It is not disputed that the statute authorizes the assessment and collection of the tax in question, the plaintiff being a resident of the state, if the provisions thereof applicable to this case be valid. But it is insisted that those provisions are unconstitutional and void. The counsel for the appellant, though insisting that the provisions in question are unconstitutional, has not pointed out any article or clause of either our state or the federal constitution, with which he claims they are in conflict; nor has he stated any proposition drawn from the spirit of either that is violated by the enactments under consideration.

It is said that the money and bank stock in question

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BOYER  
V.  
JONES.

might be taxed by the state of *Pennsylvania*, and thereby it would be twice taxed.

Supposing this to be so, it is not perceived how it would deprive the state of *Indiana* of the right to assess the tax upon a person residing within the state, or how it would affect the validity of our law. "The term 'taxes,'" say the Court in *Green v. Craft*, 27 Miss. R. 70, "includes all contributions imposed by the government upon individuals for the service of the state. The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law." The proposition thus laid down we deem correct in general, but subject to some exceptions or qualifications. We do not think it necessary, for the purposes of this case, to determine how far, and for what purposes, personal property, situated out of the state, is governed by our law, the owner being domiciled here. The law in question operates upon the owner of the property, he being a resident, and can be enforced against him, although it have no extra-territorial effect—although in *Pennsylvania* it would be disregarded.

The practice of taxing a resident of a state for choses in action, or corporation stock, in another state, is no new thing, and has received the sanction of very respectable judicial tribunals.

Thus, in *The Commonwealth v. Hays*, 1 B. Mon. 1, it was said by the Court that "debts being of no place, but being in general regarded as attendant on the person of the creditor, may be considered as property within this state, though the debtor reside out of the state. But even if considered as property out of the state, they are, at any rate, a part of the property of the resident citizen, a part of his resources, and a portion of the wealth of the state from which she has a right to derive a part of her revenue," &c. *Vide*, also, *Johnson v. The Commonwealth*, 7 Dana, 338.

In *Great Barrington v. The Comm'rs, &c.*, 16 Pick. 572,

one *Rosetter*, a resident of *Massachusetts*, had been taxed in that state for stock which he owned in a turnpike corporation in the state of *New York*. The stock of the corporation had been annually taxed in the latter state, and the question was, whether the tax assessed in *Massachusetts* was valid. The question turned partly upon a statute not so explicit and full as our own. The Court, in delivering their opinion, say: "All exceptions, &c., are now waived, except that which raises the question on the merits, namely, whether a citizen of this commonwealth, holding stock in a turnpike company in another state, is liable to be taxed for such stock in this state. \* \* \* The tax act included, in its terms, all bank and insurance stock, and shares or property in any incorporated company for a bridge or a turnpike road. No exception is made of companies in other states, and the Court perceive no reason for raising any by implication." It will be seen by a note to the case, that the legislature afterwards removed any supposed uncertainty about the statute, by describing the taxables as "stocks in turnpikes, bridges, and all moneyed corporations, whether within or without the state."

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1860.

BOYER  
v.  
JONES.

The appellant insists that bank stock is not personal property. However it may be regarded generally, the statute above set out makes it such for the purposes of taxation.

We see no reason why the enactments under consideration, so far as they affect the case at bar, are not valid.

Another objection is made, however, to the ruling below. The plaintiff having refused to list the property in question, or swear to its value, fifty per cent. was added thereto, under the provisions of the 83d section of the act. This section is claimed to be unconstitutional; and it is, therefore, insisted that the treasurer should have been restrained from collecting the fifty per cent. thus added to the taxes by way of penalty.

This section is claimed to be unconstitutional upon the ground decided in some unnamed case in this Court. The case alluded to is supposed to be *The Madison, &c., Railroad Co. v. Whitneck*, 8 Ind. R. 217. It was there held

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v.  
THE STATE.

that so much of the third section of the act of 1853, relative to compensation for animals killed or injured by a railroad company, as inflicts a penalty for appealing and failing to reduce the damages twenty per cent., was unconstitutional and void. The Court say: "The section, then, being special, and upon the practice of the law, is prohibited by that clause of § 22, art. 4, of the constitution, which provides that no such act shall be passed regulating the practice in Courts of justice."

We do not perceive any analogy between that case and the present; nor do we think there is any well founded objection to the section under consideration.

*Per Curiam.*—The judgment is affirmed with costs.

*R. A. Chandler*, for the appellant.

*J. N. Brown* and *J. Park*, for the appellees.

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### DAVIS v. THE STATE.

Where the Court adjourns for the day, till the next morning, with a notice that it will appear in the Court house, in the intermediate time, on the ringing of the bell, to receive the verdict of a jury who may be out, and does so appear and receive it, the proceeding is regular.

Wednesday,  
June 6.

APPEAL from the *Marshall* Court of Common Pleas.

WORDEN, J.—Information against the appellant for forcible entry and detainer. Motion to quash the information overruled. Trial, conviction, and judgment.

Several errors are assigned; but we find no brief in the case on behalf of the appellant. We see no defect in the information. The errors assigned, except that in relation to the information, raise but one question, which grows out of the following state of facts, as shown by a bill of exceptions:

The cause having been heard by the jury, the Court directed them that if they should agree upon a verdict be-

fore nine o'clock at night of the same day, they should return into Court with their verdict; but if they should not agree by that time, they should seal up their verdict, and put it into the hands of their bailiff, who would deliver it to the Court the next day. To this the appellant objected, stating that he wished the verdict returned into open Court; and thereupon the Court directed the jury to cause the bailiff to ring the court-house bell whenever they should have agreed upon a verdict, and informed them that upon the ringing of the bell, the judge would appear in Court, and receive their verdict. The Court then adjourned until nine o'clock next morning. About seven o'clock the next morning, the jury having agreed, the Court house bell was rung, and the judge repaired to the Court room and received the verdict in the absence of the appellant, who was not called, nor was his counsel.

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1860.

DAVIS  
V.  
THE STATE.

These proceedings, it seems to us, were sufficiently regular. The appellant and his counsel were abundantly notified that upon the ringing of the bell, the verdict of the jury would be received in Court; and we think the Court had a right to thus receive it, although the hour had not arrived to which the Court stood adjourned. The adjournment of the Court generally until the next morning at nine o'clock, did not deprive it of the authority to receive the verdict before that time. Although there was a general adjournment until nine o'clock the next morning, yet for the purpose of receiving the verdict whenever the jury should agree, we think the Court continued open, and of this the appellant was fully advised by the order given by the Court to the jury.

This case differs materially from *Rosser v. McColly*, 9 Ind. R. 587. There the verdict was received by the judge at his private residence. Here it was regularly returned into open Court, and the proceedings were entirely regular in every respect, except that the hour had not arrived to which the Court had adjourned. Although there was a general adjournment until nine o'clock the next morning, we think, under the circumstances, the appellant was required to take notice of the agreement of the jury, and to

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1860.

WOLF  
v.  
SMITH.

be in Court to exercise his right of polling the jury, or taking any other step he might desire, upon the rendition of the verdict.

The verdict seems to be sufficiently sustained by the evidence.

*Per Curiam.*—The judgment is affirmed with costs.

*C. H. Reeves* and ——— *Brady*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

### WOLF and Another v. SMITH.

An agent is competent to prove his authority where it is given by parol.

The consideration for the assignment of a note need not necessarily be paid at the time, to render the assignment complete.

Wednesday,  
June 6.

APPEAL from the *Delaware* Court of Common Pleas.

WORDEN, J.—Suit by the appellants against the appellee upon a note made by the latter to *William Vandapool*, and by *Vandapool* indorsed to the plaintiffs.

Answer, that before the defendant had any notice of the assignment of the note to the plaintiffs, *Vandapool* was indebted to the defendant for work and labor, and upon two notes, one given by *Vandapool* to *Nottingham*, and by the latter indorsed in blank to *James Hunter*, and by *Hunter* to the defendant; the other note given by *Vandapool* to *Hathaway*, and by him indorsed to the defendant; which claims the defendant offered to set off against the note sued on. The set-off thus set up exceeded the amount of the note sued upon.

Replication under oath denying the assignment of the *Nottingham* note by *Hunter*.

Trial by the Court; finding and judgment for the defendant, a new trial being denied.

The main controversy is, as to the assignment of the

*Nottingham* note to the plaintiffs by *Hunter*, the assignee of *Nottingham*. The assignment, it appears, was made by one *Nation*, in the name of *Hunter*. It is insisted that the Court admitted hearsay and improper evidence to establish *Nation's* authority from *Hunter* to make the assignment. It may be that some statements of third parties were improperly admitted; but *Nation* testified that he was expressly authorized by *Hunter* to make the assignment. The authority of *Nation* does not appear to have been in writing; and where it is by parol, the agent is a competent witness to prove it. 1 Greenl. Ev., § 416. But it is insisted that *Hunter* himself was the better witness to prove his delegation of authority to *Nation*, and that the law requires the best evidence of which the case, in its nature, is susceptible. We recognize the rule, but think it not applicable to the case. The authority, so far as appears, was given by parol, and *Nation* was as competent to testify in relation to it as *Hunter* himself. "In requiring the production of the best evidence applicable to each particular fact," says Mr. *Greenleaf*, "it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence, which itself indicates the existence of more original sources of information. But where there is no substitution of evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." 1 Greenl. Ev., § 82.

Striking out any improper testimony that may have been admitted, we do not feel authorized to disturb the finding of the Court upon this point, as it was sustained by competent and legitimate testimony.

So, also, in respect to notice. *Smith*, whom the plaintiffs swore as a witness, testifies that at the time the notes were assigned to him, he supposed *Vandapool* still held the note sued upon. Concurrently with the assignment of the note to *Smith*, the defendant, he executed an agreement to *Hunter* and to *Hathaway*, promising to pay them severally the amounts appearing to be due on the notes thus as-

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WOLF  
V.  
SMITH.

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v.  
MUSSLEMAN.

signed to him, by a day named, but stipulating that the amounts were not to be paid, should a Court of competent jurisdiction decide that he could not set them off against the note he had given to *Vandapool*, in the absence of notice to him, the defendant, of assignment thereof.

The counsel for the appellants insist that the transfer of the notes to the defendant was thus made conditional, and that they cannot be set off.

We do not think the agreement thus made affects the validity of the transfer of the notes so as to prevent the title thereto from vesting in *Smith*. The consideration of the assignment of a note need not be paid down. An agreement to pay at a future day will support the assignment. This agreement was for the future payment of the consideration. The condition which should defeat the obligation to pay, has, so far as appears, never arisen. Hence, the transfer is perfect, and the agreement to pay the consideration therefor, binding.

This set-off is sustained by the case of *Clapton v. Morris*, 6 Leigh, 278, where a similar question was involved.

We find no error in the case which should reverse the judgment; hence, it must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*W. March* and *W. Brotherton*, for the appellants.

*D. Nation*, for the appellee.

### WADE v. MUSSLEMAN.

Wednesday,  
June 6.

APPEAL from the *Cass* Court of Common Pleas.

*Per Curiam*.—Suit upon a note. Answer, without oath, denying the execution of the note. Demurrer to the answer sustained, and final judgment for the plaintiff.

The answer made a good issue, but did not put the plaintiff upon proof of the execution of the note. The demurrer to it was erroneously sustained.



The judgment is reversed with costs. Cause remanded, &c. May Term,  
1860.

*D. D. Dykeman*, for the appellant.

*E. Walker*, for the appellee.

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v.  
JONES.

**BAKER v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND  
STRAIGHT LINE RAILROAD COMPANY.**

APPEAL from the *Greene* Circuit Court.

*Wednesday,  
June 6.*

*Per Curiam*.—This case is similar to that of *O'Donald* against the same appellee, at this term (1).

The judgment is affirmed with 3 per cent. damages and costs.

*J. N. Evans*, for the appellant.

*D. M' Donald* and *A. G. Porter*, for the appellees.

(1) *Ante*, 259.

**WILLIAMS v. JONES and Others.**

APPEAL from the *Madison* Court of Common Pleas. *Wednesday,  
June 6.*

PERKINS, J.—This cause was before the Supreme Court at a former term; and the nature of the action, as well as the decision rendered on its former submission, appear in 12 Ind. R. 561.

The opinion reversing the judgment was not filed in the Court below sixty days before the first day of the term at which the cause was again called up for trial; and it was objected that the fact just stated precluded a trial at the then term.

By the code of 1852, notice of the decision of a cause

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V.  
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in the Supreme Court is immediately sent to the Court below; and, if no petition for rehearing prevent, at the expiration of sixty days thereafter, a copy of the decision is transmitted, accompanied by such instructions as the Supreme Court may give.

If a new trial is ordered, it must take place as soon as the Court and parties are ready for it. The parties must be taken to be ready, unless they (or one of them) show legal cause for delay. The code is silent on the question of time of trial, further than that the cause must be remanded for further proceedings. Perk. Pr., pp. 320, 337.

A point was made in reference to a variance occasioned by the use of the word *District* for *Circuit* Court; but the Court being satisfied that it was a mere clerical mistake, as indeed was self-evident, and that the parties had acted upon it as such, disregarded it.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*W. R. Pierse*, for the appellant.

*M. S. Williams*, for the appellees.

THE CINCINNATI, PERU AND CHICAGO RAILROAD COMPANY  
v. WALKER.

Wednesday,  
June 6.

APPEAL from the *Laporte* Circuit Court.

*Per Curiam*.—*The Cincinnati, &c., Railroad Company* was sued by *William J. Walker* for 155,000 dollars, for work and labor, &c. Process was duly served.

The company confessed judgment through a power of attorney, which recites that it was executed pursuant to a resolution of the board of directors, conferring the power upon the president and secretary to make it.

The president made oath that the judgment was not confessed to defraud creditors.

The judgment was rendered without relief, &c.

Nothing appears authorizing the judgment without relief, and that part of it must be reversed with costs.

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1860.

We think a *prima facie* case, authorizing the judgment by confession, was made. If the judgment is fraudulent, creditors, by a proper proceeding, may avoid it as to themselves.

SCHLOSSER  
v.  
FOX.

The judgment is affirmed, except as to collection without relief, &c. That part is reversed with costs.

*J. B. Niles*, for the appellants.

*J. Bradley* and *J. Woodward*, for the appellee.

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SCHLOSSER v. FOX.

APPEAL from the *Warren* Court of Common Pleas.

Wednesday,  
June 6.

PERKINS, J.—*Fox* sued *Schlosser* for an assault and battery. *Schlosser* demurred to a paragraph of the complaint, assigning for cause that it contained two causes of action. The demurrer was rightly overruled. The objection should have been taken by motion to strike out. Perk. Pr., 166.

The defendant answered by general denial, and specially, *son assault demesne*. A demurrer was sustained to the second paragraph, and rightly, because it did not show that the first assault alleged justified or excused the second, for which suit was brought. 2 Pet. Abr. 375. See 4 Ind. R. 442, and cases cited.

The defendant filed a third paragraph of his answer, setting forth that he had not been cited before the Court of conciliation. This was no bar to the suit. It might have been for a motion upon taxation of costs. Perk. Pr., p. 366.

On the trial, the defendant offered to prove, in mitigation of damages, that the plaintiff, *Fox*, had caused a prosecution for malicious mischief to be instituted (among others) against the minor son of the defendant, and that

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v.  
CLEVINGER.

he assaulted and beat him for so doing. He also offered to give the record of such prosecution in evidence. See 2 Greenl. Ev., p. 69. He also offered to prove that the plaintiff, *Fox*, had, some two or three days before the commission of the assault and battery, given him, defendant, great provocations, without specifying particularly what they were.

The Court refused all these items of evidence. If matter in mitigation can be given in evidence under the general denial, we think the above described items of evidence were rightly excluded—the first as being no matter of mitigation; the second as being irrelevant; and the third as being too indefinite in the offer, and probably of too long prior occurrence. 2 Greenl. Ev., p. 70.—*Fullerton v. Warrick*, 3 Blackf. 219.

In view of the facts of the case, and, as one of them, that the damages recovered were but 35 dollars, we think the defendant below was not seriously injured by the exclusion of evidence in mitigation.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*B. F. Gregory, J. Harper, and J. N. Brown*, for the appellant.

*R. A. Chandler*, for the appellee.

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#### THE STATE v. CLEVINGER.

Wednesday,  
June 6.

APPEAL from the *Delaware* Court of Common Pleas.

*Per Curiam*.—An affidavit was filed before a justice of the peace, charging *Clevinger* with having “maliciously injured a toll-gate, the property of the *Walnut-street Turnpike Company*, of the value of five dollars, by then and there taking the same down off the hinges, to the damage of said turnpike company,” &c.

Before the justice, the defendant was fined; and in the

Court of Common Pleas, a motion was made by defendant, and sustained, to dismiss the case because of the insufficiency of the affidavit.

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1860.

KYLE  
v.  
HAYWARD.

It is insisted that the affidavit does not sufficiently aver the specific injury done; and we are referred to *Aydelott v. The State*, 7 Blackf. 157, and *Jackson v. The State*, 7 Ind. R. 270. The authorities cited do not appear to us to sustain the position assumed by the appellee. Here the injury is stated, namely, removing the gate from its hinges. The amount of the injury thereby caused was another question—one of fact—to be determined upon the evidence and circumstances attending the act.

The judgment is reversed with costs. Cause remanded, &c.

*C. M. Anthony* and *W. March*, for the state.

*D. Nation* and *W. Brotherton*, for the appellee.

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KYLE v. HAYWARD and Others.

The Court should not change its record without giving a hearing to the party resisting the change, where a hearing is asked.

APPEAL from the *Delaware* Circuit Court.

Wednesday,  
June 6.

PERKINS, J.—On the 3d of *May*, 1856, *Kyle* filed his complaint against *Hayward*, *Pollock*, and others, to obtain a title to real estate.

The defendants answered; the cause was argued; and, at the *September* term, 1857, before any decision was announced, the Court permitted the important papers in the cause (says the record) to be withdrawn by the plaintiff, as would be inferred, for the purpose of another suit, and thereupon the following judgment was entered of record:

“The parties by counsel come, and the Court having heard the argument of counsel, said plaintiff suffers a non-suit in this cause. It is therefore considered by the Court

May Term, 1860. that said defendants recover of said plaintiff their costs in this behalf expended."

KYLE  
v.  
HAYWARD. No exception appears to have been taken, nor motion made touching this judgment, at said *September* term, nor at the succeeding spring term of the Court.

At the *September* term, 1858, a notice was given, and a complaint filed to obtain an expunging of the judgment as rendered above, and the substitution of another and different judgment, one upon the merits of the entire cause. The defendants, without full appearance, moved to quash the notice, whereupon proof in relation to service of it was made. The defendants then asked leave to demur to the complaint, but the Court refused permission. They then asked leave to answer, but the Court denied the privilege, and proceeded to expunge the judgment, rendered more than a year, as it seems, before, and substitute in place thereof a judgment upon the merits of the cause, forever barring the plaintiff's right to perfect his title.

We have great doubts about the power of the Court to thus change the records, in so important a matter, after so long delay. See *McDonald v. Watkins*, 4 Ark. R. 624; S. C., Kinney's Compendium, 1843, p. 260; *Woolley v. Woolley*, 12 Ind. R. 663.

But this point has not been sufficiently discussed to justify us in deciding it.

We are satisfied that, even were it in the power of the Court to make such change, the power should not be exercised without giving the defendants a hearing, where a hearing is asked.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*T. J. Sample*, for the appellant.

*W. March*, for the appellees.

## SAGE v. MATHENY.

May Term,  
1860.SAGE  
v.  
MATHENY.

A party may be relieved from a judgment taken by default, where he had not actual notice of the suit, and was, at the time of constructive service of the process, and until after the expiration of the term of the Court at which the judgment was rendered, absent from the state, and physically unable to return.

If upon the overruling of a demurrer to the petition for such relief, the Court set aside the default, without first ordering the plaintiff to plead over, he cannot assign the ruling as error unless the record show that the Court refused to permit him to plead over.

APPEAL from the *Harrison* Court of Common Pleas. *Wednesday, June 6.*

DAVISON, J.—*Matheny*, on the 19th of *January*, 1858, filed in the clerk's office of said Court his petition, alleging that in *October*, 1857, *Sage*, the appellant, instituted, in the same Court, an action against him, *Matheny*, and one *Bazil Meek*, on a promissory note purporting to have been given by *Meek* and *Matheny* to *Sage*, for the payment of 192 dollars; that a copy of the summons issued in said action was left by the sheriff at *Matheny's* usual place of residence in *Harrison* county, and upon this service of process, a judgment by default was taken against him on the 11th of *November*, 1857, for 229 dollars. The petition further alleges that at the date of the note, *Matheny* was not a partner of *Meek*; that he did not owe *Sage* any sum whatever, either as partner or individually, nor did he execute said note, or authorize any one to execute it on his behalf; that he had no knowledge of the existence of such a note until after the adjournment of the term of the Court at which said judgment was rendered, nor had he actual notice of the pendency of said action, or of the judgment against him, until after the adjournment of said term, he being absent from home, being in the city of *Cincinnati, Ohio*, and unable, from bodily disability, to get home. It is also alleged that the judgment against him is oppressive and unjust; and the relief prayed is that the judgment by default be set aside, and that he be allowed to answer the complaint on the note, &c. The petition was verified by oath.

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1860.

SAGE  
V.  
MATHENY.

*Sage*, the plaintiff, demurred to the petition; but the demurrer was overruled, and he excepted, and the Court thereupon made an order setting aside the judgment against the defendant, and granting him leave to answer the complaint in the action upon the note; but to the making of this order there was no exception taken by the plaintiff.

The defendant then answered the plaintiff's complaint—

1. That he did not execute the note in suit.

2. That at the date of the note, he was not a partner of *Meek*, nor had *Meek* or any other person authority to sign defendant's name to said note.

3. That defendant did not, at the date of the note, nor does he yet, owe the plaintiff anything, either as partner or individually.

The answer was verified by the oath of the defendant.

The record avers that the parties submitted the issues to the Court, and that upon the trial the plaintiff offered the note in evidence, without proving its execution, but his offer was refused, and he excepted. And the Court being duly advised, &c., found for the defendant, and upon its finding rendered judgment, &c.

The action of the Court in overruling the demurrer, raises the first question to be considered. The petition was based upon § 99 of the practice act. That section provides that the Court may, in its discretion, at any time within one year, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. 2 R. S. pp. 48, 49. We perceive no objection to the petition. The facts which it states, in our judgment, make a case plainly within the statutory provision just quoted. There was, it is true, sufficient constructive service of process; but the defendant had no actual notice of the suit, and was at the time of the service, and up until the expiration of the term of the Court at which the judgment was rendered, absent from the state, such absence having been caused by bodily disability. The demurrer, in our opinion, was not well taken.



But it is insisted that the Court, upon overruling the demurrer, should have adjudged that the plaintiff answer the petition, and that having failed to do this, the order setting aside the judgment, &c., was erroneous. In answer to this objection, it is enough to say, that to the making of the order there was no exception, and, consequently, the error, if any was committed, is not properly before this Court. The code says that "the judgment upon overruling a demurrer shall be that the party plead over;" and that "if the party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default." 2 R. S. p. 123, § 382. This provision, strictly construed, might be held to impose a duty on the Court, in every case in which it overruled a demurrer, to adjudge that the party plead over; but we are not inclined to adopt that construction. Unless the record shows affirmatively that the Court had refused to allow the party to answer the pleading to which the demurrer was overruled, the proceedings should not be held objectionable. This construction is not in conflict with the language of the provision; but renders it, as a rule of procedure, consistent and effective.

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EASTERDAY  
V.  
JOY.

There being no motion for a new trial, the exception taken to the refusal to admit the note in evidence cannot be assigned for error.

*Per Curiam.*—The judgment is affirmed with costs.

*W. Q. Gresham*, for the appellant.

*W. A. Porter*, for the appellee.

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EASTERDAY v. JOY and Another.

Suit to recover land. The plaintiff relied upon a sheriff's deed. The defendant claimed title as the vendee of the execution-defendant. The sheriff's sale was upon a judgment recovered before a justice, a transcript of which was filed in the office of the clerk of the Common Pleas. The complaint averred that the defendant purchased whilst the writ was in the sheriff's

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1860.

EASTERDAY  
v.  
JOY.

hands, and after levy upon the land. The issue upon which the cause was decided was made upon a paragraph of the answer setting up that the judgment-defendant was not, at the time of the rendition of the judgment, a resident of the county, and did not appear to the action. The finding of the Court sustained the facts stated in this paragraph, and declared the judgment a nullity. *Held*, that the paragraph was bad, and the finding erroneous.

Wednesday,  
June 6.

APPEAL from the *Miami* Circuit Court.

HANNA, J.—Suit by the appellant to recover land. He relies upon a sheriff's deed, &c. The defendants claim title as the vendees of the execution-defendant.

One *Hubbard* recovered a judgment against *Jonathan Joy*, before a justice of the peace of *Wabash* county. Execution was issued thereon, and returned no property found, &c. The plaintiff filed a transcript and affidavit in the office of the clerk of the Court of Common Pleas of said county of *Wabash*. An execution was issued to the sheriff of *Miami* county, who levied the same upon the land in controversy, and sold it to said appellant. The complaint avers that the defendants purchased said land of *Jonathan Joy*, whilst said writ was in the hands of the sheriff, and after the same had been levied on said lands.

The defendants filed an answer of nine paragraphs; but before considering any question that may arise upon them, we are asked to pass upon the special, written finding of the Court upon a point on which the Court appears, so far as the record shows, to have decided the case.

It was set up in the answer that the said *Jonathan Joy* was not, at the time of the rendition of the judgment by the justice, &c., a resident of *Wabash* county, but was a resident of *Miami* county, and did not appear to said action. A demurrer was overruled to that portion of the answer.

The plaintiff replied, first, by a denial; second, by pleading the judgment of the justice with the proceedings, substantially.

The Court found as follows: "The Court finds that *Jonathan Joy*, the execution-defendant, was not a resident of *Wabash* county, at the time of the commencement of

the suit in which the judgment was rendered; and that said judgment was, therefore, a nullity, and the sheriff's sale made under it conveyed no title. The above is the evidence in the above cause, and the conclusion of law thereon." [Signed by the judge.]

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1860.

EASTERDAY  
v.  
JOY.

Upon this finding, the plaintiff moved for a new trial, which was overruled, and a judgment rendered for the defendants.

There were several questions in the case, other than that arising upon the issue made as to the residence of the defendant in the judgment, and the plaintiff contends that this record shows that the Court did not pass upon any of said questions, or issues, except the single one as to the place of residence of the defendant in said judgment; and that issue was immaterial, and did not authorize the Court to render final judgment for the defendant.

There does not appear to have been any finding of a general character; but that the judgment was based upon the finding above set forth; which was upon the issue formed on the sixth paragraph of the answer, averring that *Joy* was a resident of *Miami* county, and that said judgment before the justice, was obtained in *Wabash* county, and that said *Joy* did not appear, &c.; setting forth, with some particularity, the proceedings in said case. It is not averred that *Joy* had not been served with process, even if he could thus have contradicted the return of the officer. See *Westcott v. Brown*, at the last term (1).

The answer was not sufficient. *Maxwell v. Collins*, 8 Ind. R. 39. The special finding did not authorize the conclusion arrived at. The judgment must be reversed.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*N. O. Ross* and *R. P. Effinger*, for the appellant.

*O. Blake* and *H. P. Biddle*, for the appellees.

(1) 13 Ind. R. 83.

There is a late case in *Massachusetts*, denying the doctrine of that case. 13 Gray, 591. The rule is stated to be otherwise in that state, and numerous authorities are cited.

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THE STATE *v.* KUNBERT.

THE STATE  
*v.*  
KUNBERT.

The Court of Common Pleas has no authority to order a justice of the peace to grant an appeal from his judgment, after the expiration of the thirty days allowed by statute.

Wednesday,  
June 6.

APPEAL from the *Ripley* Court of Common Pleas.

DAVISON, J.—*Kunbert* filed an affidavit, alleging that he had been tried before one *Jackson*, a justice of the peace, upon a charge of obstructing a public highway, and fined 10 dollars; that in the trial before the justice, he had an attorney in whom he had confidence, and on being adjudged guilty, he informed his attorney and the justice that he desired an appeal; that his attorney immediately prepared an appeal-bond, which he executed with a surety to the satisfaction of the justice; that neither the attorney nor the justice “intimated to him but that the case was properly appealed,” and believing that it was legally appealed, he appeared in said Court, at the next term after he supposed he had taken the appeal, and then, for the first time, discovered that his appeal was not well taken, because he had not entered into a recognizance; that the appeal was dismissed; and that then the time for taking an appeal—thirty days—had elapsed. It is further alleged that the affiant had a valid defense, &c., and his prayer is, that he may now have leave to file his recognizance before the justice, and take his appeal, &c.

Upon this affidavit, the Court made an order directing the justice to allow an appeal from his judgment in said cause, in case the defendant entered into recognizance, &c., which was done, &c.

The record shows that the cause, having been thus appealed, stood continued, &c.; and that, at the term to which it was continued, the state moved to dismiss the appeal so allowed by the Court; but the motion was overruled, and the state excepted.

The statute prescribing the powers, &c., of justices in state prosecutions, enacts that any prisoner against whom

any punishment is adjudged, may appeal to the Common Pleas, at any time within thirty days after trial, on entering into recognizance for his appearance at the next term of such Court, as in other cases, and such appeal shall stay proceedings. 2 R. S. p. 498, § 10. It may, however, be noted that the statute thus prescribing the powers of justices, &c., makes no provision for such appeal after the lapse of thirty days from the trial. Hence, the appellee, in this case, has based the affidavit before us upon § 68 of an act defining the jurisdiction of justices of the peace in civil cases. That section provides that appeals may be authorized by the Court of Common Pleas or Circuit Court, after the expiration of thirty days, when the party seeking the appeal has been prevented from taking the same by circumstances not under his control. *Id.*, p. 463. This section, it will at once be seen, relates exclusively to appeals in civil cases, and did not, therefore, authorize the appeal in question, unless directly or by implication, referred to and adopted by the statute prescribing the powers, &c., of justices in state prosecutions. Upon looking into that statute, it will be found that no such reference is made; and the result is, the Common Pleas had no authority to grant the appeal. Hence, it is unnecessary to inquire whether the affidavit was or was not sufficient. The motion to dismiss should have been sustained.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*G. Durbin*, for the state.

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1860.

LITTLE  
v.  
NORRIS.

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LITTLE and Another v. NORRIS.

APPEAL from the *Marion* Circuit Court.

*Per Curiam.*—Suit by *Norris* against the appellants to foreclose a mortgage.

The defendants answered, and filed interrogatories to

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1860.

BOLLE  
v.  
THE STATE.

be answered by plaintiff, which the clerk certifies were answered, but the answers were not on file. After this, the defendants were called, and not appearing, the cause was tried by the Court, which resulted in judgment of foreclosure.

If any irregularity occurred in the proceedings, or in the order of the Court in reference to the sale of the mortgaged premises, application should have been made in the Court below to correct it, which was not done.

The appeal is dismissed with costs.

*K. Ferguson*, for the appellants.

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BOLLE v. THE STATE.

Thursday,  
June 7.

APPEAL from the *Floyd* Court of Common Pleas.

*Per Curiam*.—*Meleti Bolle* filed before a justice of the peace an affidavit for surety of the peace against certain parties, who were brought before the justice, and by him recognized to appear before the Court of Common Pleas. In the Common Pleas, on the cause being called, *Meleti* failed to appear; whereupon, the record reciting that “said *Meleti Bolle* being married, and the wife of *Joseph Bolle*,” judgment was rendered against *Joseph Bolle* for costs.

This judgment against *Joseph Bolle* for costs was wrong, in our opinion, and must be reversed.

The judgment against *Joseph Bolle* is reversed, and the cause remanded.

*W. T. Otto* and *J. S. Davis*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

## FARLEY v. HARVEY.

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1860.FARLEY  
v.  
HARVEY.APPEAL from the *Hamilton* Court of Common Pleas.

*Per Curiam*.—Suit by *Harvey* against the appellant upon a promissory note. Trial; finding and judgment for the plaintiff. Thursday,  
June 7.

The counsel for the appellant, in his brief, says that “the appellant, in bringing this case to the Supreme Court, desires to test the question of *variance*; to determine whether the widest departure, and the most unlimited variance between the complaint, pleadings, and proof, is of any avail under our present statute and practice.”

Such being his object, he has been a little unfortunate in selecting a case in which no variance whatever is shown to exist; hence, those questions cannot be tested in this case.

Here, the plaintiff, *John C. Harvey*, alleges that the defendant, by his note, &c., promised to pay the plaintiff a certain sum of money. A copy of the note is set out, and constitutes a part of the complaint, and from this it appears that the note was payable to *J. C. Harvey*. The averments in the complaint, together with the copy of the note constituting a part of it, are equivalent to a direct allegation that the note was made to the plaintiff by the name of *J. C. Harvey*. *Hunt v. Raymond*, 11 Ind. R. 215.

The variance between the name of the plaintiff in full, and the initials as they appear in the note, is the matter complained of.

The production of the note payable to *J. C. Harvey*, was sufficient, without any other proof, to sustain the action, it not being denied under oath that it was payable to the plaintiff. *Abernathy v. Reeves*, 7 Ind. R. 306.—*Hauser v. Hays*, 11 *id.* 368.

The judgment is affirmed with 10 per cent. damages and costs.

*D. C. Chipman*, for the appellant.

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1860.

MATLOCK v. POWELL, Executor.

MATLOCK  
v.  
POWELL.

*Marwell v. Collins*, 8 Ind. R. 38, followed.

If the right of a foreign executor to sue as such be not denied by an answer under oath, it is admitted, and he need offer no proof of his appointment.

Thursday,  
June 7.

APPEAL from the *Putnam* Court of Common Pleas.

WORDEN, J.—*Powell*, as executor of *Lee*, sued *Matlock* before a justice of the peace, for money had and received. *Matlock* appeared to the action, and, on judgment being rendered against him, appealed to the Court of Common Pleas, where the cause was tried by the Court, who found for the plaintiff, and rendered judgment on the finding, overruling a motion for a new trial.

*Matlock* appeals to this Court, and has assigned nine errors in the proceedings below, the second, third, fifth, and sixth of which relate to the sufficiency of the evidence to sustain the finding, and they will be no further noticed, no error being assigned upon the decision of the Court in overruling the motion for a new trial. The eighth and ninth are, that the judgment is not sustained by the evidence; and that the judgment was rendered for the plaintiff, whereas it should have been rendered for the defendant. These assignments present no question for determination here.

The remaining errors assigned are as follows:

1. "That said *Putnam* Court of Common Pleas had no jurisdiction of said *Matlock*, defendant below, he being a resident of the county of *Hendricks*, and this suit having been commenced in the justice of the peace Court."

4. "That the Court erred in permitting the record of the letters testamentary and their authentication to be read in evidence, the same not being duly and legally certified to be in due form."

7. "That the said executor, being a foreign executor, had no authority to sue in the Courts of *Indiana*."

It appears by the bill of exceptions, that *Matlock*, at the time the suit was commenced, was a resident of the county



of *Hendricks*, and not of the county of *Putnam*, in which the suit was commenced, and where the cause of action accrued. It also appears by the justice's transcript, that process was duly served upon him, and that he appeared to the action without making any objection to the jurisdiction. Indeed, no objection of the kind appears to have been made, either before the justice or in the Common Pleas. But had the objection been made, it could not have prevailed, as was settled in the case of *Maxwell v. Collins*, 8 Ind. R. 38.

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MATLOCK  
v.  
POWELL.

The plaintiff sued as a foreign executor, appointed by the Probate Court of *Tuscaloosa* county, in the state of *Alabama*, and the objection to the authentication of his letters testamentary is, that such authentication is not strictly in accordance with the act of congress, or § 286 of the code, on the subject of the attestation of records of judicial proceedings of other states. There being no plea filed under oath denying the plaintiff's representative capacity, under the provisions of §§ 152 and 159 of the statute on the subject of executors and administrators (2 R. S. pp. 283, 284), it was not necessary that the letters testamentary should have been offered in evidence at all.

Section 152 provides that "it shall not be necessary for such executor or administrator (resident) to make profert of his letters, nor shall his right to sue as such executor or administrator be questioned, unless the opposite party shall file a plea denying such right, with his affidavit to the truth thereof thereunto attached."

The 159th section provides that "A non-resident executor or administrator, duly appointed in any other state or country, may commence and prosecute any suit in any Court of this state, in his capacity of executor or administrator, in like manner and under like restrictions as a resident."

Under these provisions, a foreign executor or administrator, as well as a resident, may sue, and unless his authority be denied under oath as provided for, his capacity and right to sue are admitted, and he need offer in evidence on the trial no proof of his appointment. Hence, it is wholly

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THE STATE  
v.  
ELLISON.

immaterial whether the objection to the letters offered in evidence was well taken or otherwise.

The seventh assignment of error is disposed of by reference to the section of the statute above quoted, authorizing foreign executors and administrators to sue in the Courts of this state.

*Per Curiam.*—The judgment is affirmed with costs.

*A. Daggy*, for the appellant.

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THE STATE v. ELLISON.

Thursday,  
June 7.

APPEAL from the *Lawrence* Court of Common Pleas.

WORDEN, J.—Information against the defendant, charging that “on the first day of *December*, 1856, at said county, *Andrew Ellison* did maliciously and mischievously kill and cause to be killed one colt, the property of one *Lorenzo Whitted*, of the value of 35 dollars, contrary,” &c.

The information, on motion of defendant, was quashed, and the state excepted, and appeals to this Court.

We discover no defect in the information, and none has been pointed out, no brief having been filed for the appellee. We are not advised upon what ground the information was quashed, except from the brief of counsel for the state. It is there stated that the information was quashed, because the affidavit on which it was predicated charged the defendant with the commission of the offense, not absolutely, but only as the affiant verily believed. Such is the character of the affidavit; but that seems to us to be sufficient. Such is the statutory form of an affidavit for proceedings in criminal cases before a justice of the peace. 2 R. S. p. 502. We see no substantial reason for any greater degree of strictness in this respect, in proceedings in the Common Pleas. In *Simpkins v. Malatt*, 9 Ind. R. 543, the Court held that an affidavit sworn to upon the belief of the party making it, was equivalent to one sworn

to in absolute and direct terms. The Court say, quoting from *Roscoe*, "Belief is to be considered an absolute term; hence, to swear that he believes a thing to be true, is equivalent to swearing that it is true."

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1860.

BARCUS  
v.  
EVANS.

*Per Curiam.*—The judgment quashing the information is reversed at the costs of the appellee, and the cause remanded for further proceedings.

*A. B. Carlton and R. C. McAfee*, for the state.

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167 590

### BARCUS and Another v. EVANS.

In a suit upon a note by an assignee, he should aver in his complaint the mode in which the assignment in the given case was executed; because, if it was by delivery, he must make the assignor a party; but if it was by indorsement, he need not.

APPEAL from the *Allen* Court of Common Pleas.

Thursday,  
June 7.

PERKINS, J.—Suit upon notes and a mortgage. The suit is by an assignee. He alleges in his complaint that the payees "assigned and delivered the notes," &c., to the plaintiff. The notes and mortgage were set out by copy, but no assignment of them. The assignors were not made parties. For this cause, specially assigned, the complaint was demurred to; but the demurrer was overruled, and exception taken. There was a personal judgment on the notes for any deficiency on the mortgage sale.

Two modes of assigning notes are authorized by our code; one by delivery, and the other by "indorsement on the back thereof."

In a suit upon a note by an assignee, he should aver in his complaint the mode in which the assignment in the given case was executed; because, if it was by delivery, he must make the assignor a party; but if it was by indorsement, he need not.

In this case, the assignment is averred to have been by delivery; and, as the assignors were not made parties,

May Term, 1860. there was a defect of parties which could be reached by demurrer.

FRAZIER  
v.  
MASSEY.

It has been uniformly held that it was necessary, to show a legal assignment of an instrument under the statute, to aver that it was made by indorsement. Ind. Dig., 211. In the absence of this averment, the assignment was taken to be an equitable one.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*L. M. Ninde and H. W. Puckett, for the appellants.*

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FRAZIER and Another v. MASSEY.

Thursday,  
June 7.

APPEAL from the *Grant* Court of Common Pleas.

WORDEN, J.—Action by *Massey* against the appellants upon a promissory note made by the latter to *William T. Hess*, and by *Hess* indorsed to the plaintiff.

Answer that said *William T. Hess*, the payee of the note, was, at the time he indorsed it to the plaintiff, a minor under the age of twenty-one years; wherefore, &c.

To this answer a demurrer was sustained, and the plaintiff had judgment.

The ruling on the demurrer raises the only question involved in the case.

- a. We think it clear that the demurrer was correctly sustained to the answer. The disability of an infant to make a valid, binding contract, is a personal privilege intended for the benefit of the infant himself, and none but he, or his representatives, can take advantage of such disability. 1 Pars. Cont., 275. Besides this, the defendants, by making the note to *Hess*, asserted to the world his competency to negotiate and assign the paper, and they cannot be permitted to gainsay the assertion so made. Edw. on Bills, p. 250.—Story on Prom. Notes, § 80, 5th ed.
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*Per Curiam.*—The judgment is affirmed with 6 per cent. damages and costs.

*R. T. St. John*, for the appellants.

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1860.

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BLAKE  
v.  
HOLLEY.

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BLAKE v. HOLLEY.

APPEAL from the *Clinton* Court of Common Pleas. *Thursday, June 7.*

PERKINS, J.—Suit by *Holley* against *Blake*, upon a promissory note.

The note was given to the *Crawfordsville, Frankfort, Kokomo, and Fort Wayne Railroad Company*, and is alleged in the complaint to have been assigned by the company to the plaintiff, by delivery.

The complaint was demurred to because it did not set out and show the organization of the company. But this was unnecessary, as the execution of the note to the company admitted the fact. See *Jones v. The Cincinnati Type Foundry Company*, at this term (1).

Another ground of demurrer was that a legal assignment was not shown of the note. A corporation may authorize its proper officer to assign a note by delivery. Perhaps it would be within the general power of the officers of a railroad company to assign, in such manner as they deemed expedient, the choses in action of the company. The assignment, therefore, nothing appearing to the contrary, would be presumed valid. See *Hamilton v. The Newcastle, &c., Railroad Co.*, 9 Ind. R. 359.

There were answers by way of confession and avoidance of the consideration of the note, the existence of the corporation, &c.; but on the trial no proof was offered to sustain them, and the note made out a *prima facie* case for the plaintiff.

Counsel seem to argue the appellant's cause upon the ground that the second paragraph of the answer, setting up a failure of consideration, was held bad on demurrer;

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1860.

KECK  
v.  
SHAW.

but the record shows that an issue of fact was subsequently taken upon it, whereby the demurrer was waived. Besides, an amended answer, upon which the cause was tried, also, was subsequently filed. Further, the fact, if it existed, that the charter of the company had been annulled, after the note sued on had been legally assigned, would not deprive the plaintiff of a right already vested by a legal assignment of the note, when the company was possessed of the power to make such assignment.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

*J. E. McDonald* and *A. L. Roache*, for the appellant.

*J. N. Sims*, for the appellee.

(1) *Ante*, 89.

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KECK v. SHAW.

Thursday,  
June 7.

APPEAL from the *Shelby* Court of Common Pleas.

*Per Curiam.*—Suit by the appellee against the appellant on a contract for the sale and delivery of some cattle. Answer in denial. Trial; verdict and judgment for the plaintiff.

No question is raised by demurrer on the pleadings. No exception was taken in the cause, nor is the evidence before us. In short, no question is presented by the record.

The judgment is affirmed with 5 per cent. damages and costs.

*L. Barbour* and *J. D. Howland*, for the appellant.

THE CINCINNATI, UNION, AND FORT WAYNE RAILROAD  
COMPANY v. WYNNE and Others.

May Term,  
1860.

THE CINCIN-  
NATI, &C.,  
RAILROAD CO.  
v.  
WYNNE.

A judgment rendered upon the same cause of action by a foreign Court which had jurisdiction of the subject-matter and the parties, may be set up in bar of a suit in this state.

Suit by judgment creditors to set aside a conveyance. Answer, setting up a former judgment in the Circuit Court of the *United States*, held in the district of *Indiana*, in a suit between the same parties, upon the same cause of action. A transcript of the judgment was filed and made part of the answer. Demurrer overruled. Subsequently other creditors came in, who were not parties to the former suit, and, as an amendment to the bill pending, to which an answer was in, set up their judgments and asked that the conveyance be set aside as to them. Answer to this amendment, setting up the same judgment in bar, and making the copy thereof filed with the first answer a part of the second by reference. Demurrer sustained, and final judgment rendered, setting aside the conveyance as to all the creditors. *Held*, that, in any view of the pleadings, this was error.

APPEAL from the *Jay* Circuit Court.

Thursday,  
June 7.

PERKINS, J.—*William Brandon* and wife executed a deed, conveying to the *Cincinnati, Union, and Fort Wayne Railroad Company*, a large amount of real estate, situate in *Jay* county, *Indiana*.

*Wynne*, and a large number of other judgment creditors of *Brandon*, filed a complaint in the *Jay* Circuit Court, charging that the conveyance by the *Brandons* was fraudulent, and asking that it be set aside.

The railroad company answered, setting up a former judgment in the Circuit Court of the *United States*, held in the district of *Indiana*, between the same parties, upon the same cause of action, which judgment was in favor of the railroad company, &c. A transcript of that judgment was filed with, and made a part of the answer.

A demurrer to this answer was overruled, and the cause was continued.

At a subsequent term, certain other creditors of *Brandon*, who were not parties to the former suit in the Circuit Court of the *United States*, came in and severally set out their judgments, and asked that the conveyance by *Brandon* and wife to the railroad company be set aside as to

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THE CINCIN-  
NATI, &C.,  
RAILROAD Co.  
V.  
WINNE.

them. They filed their complaint as an amendment to the bill then pending, and to which an answer was on file.

To this amendment the railroad company answered, setting up the former judgment in the Circuit Court of the *United States* in bar, making the copy thereof filed with their first answer, a part of the second, by reference.

To this answer a demurrer was sustained, and a final judgment thereupon rendered, setting aside the conveyances by the *Brandons* to the railroad company as fraudulent as to all the creditors then parties to the proceedings in the *Jay* Circuit Court.

It has been held in *Indiana*, that the pendency of a suit for the same cause of action in a Court in another government, cannot be answered in bar of an action in a Court in this government. Perk. Pr. 223.—2 Dan. Ch. Pr. 721. But see 2 Kent, p. 122; Mitford's Eq. Pl., top p. 291. See Story's Eq. Pl., 748.

On the other hand, a judgment rendered upon the same cause of action, by a foreign Court which had jurisdiction of the subject-matter of the suit and the parties to it, may be set up in bar of a suit in this state. Story's Eq. Pl., p. 784.—Perk. Pr., 233.—2 Dan. Ch. Pr., p. 753, *et seq.*

Looking now to the manner in which the law was applied in this case, if we are to regard the amendment filed to the complaint, as bringing along with it the original complaint, so as, in fact, to take it out of the operation of the answer filed to it, and make it, with the amendment filed, an entire new complaint in the whole case, filed at the time of filing the amendment, then we must regard the answer filed to that complaint, as bringing along, by reference, the answer filed to the original complaint, and making it, with the amendment, an answer to the entire complaint as amended. If thus regarded, the answer was sufficient in point of form; for it is not necessary that the suits pleaded should be between the same parties nominally. Other parties may be shown to be concluded by the judgment. Authorities, *supra*, and 8 Blackf. 175.

If, on the other hand, we regard the original complaint, and the answer thereto, as left standing upon the record,



and the amendment as an addition to be answered by itself, as would appear, from the mode of pleading adopted, to have been the understanding of the parties, then it was error, in deciding simply upon the answer to the amendment, for the Court to determine the rights of parties, already settled by the overruling of the demurrer to the answer to the original bill, and whose rights the amendment did not affect, nor purport to bring in question, but only the rights of the new parties brought in by the amendment; inasmuch as the Court did not intimate any intention to change the decision it had already made on the original complaint and answer thereto. See Story's Eq. Pl., p. 707. See, as to the effect of a fraudulent conveyance upon subsequent creditors, *Pennington v. Clifton*, 11 Ind. R. 162.

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MEIKEL  
v.  
HARMAN.

We think the proceedings in this cause have not resulted in such an investigation of its merits as is due to justice, and that it should be reversed and remanded for further proceedings, with leave to both parties to amend their pleadings, &c.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Smith*, for the appellants.

*O. P. Morton* and *J. B. Julian*, for the appellees.

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MEIKEL v. HARMAN.

APPEAL from the *Marion* Circuit Court.

Thursday,  
June 7.

*Per Curiam*.—Suit by *Harman* against *Meikel* on two promissory notes.

Answer in denial; also payment. Trial by the Court; finding and judgment for the plaintiff.

It is assigned for error that the defendant had no notice of the proceedings below, and that the judgment is for 100 dollars more than appears to be due on the notes.

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1860.

BENFIELD  
v.  
REYNOLDS.

The defendant appeared and answered to the suit. The amount found by the Court varies but a few cents, if any, from the amount appearing to be due on the notes; besides there was no motion for a new trial. It is very apparent that there is no error in the record.

The judgment is affirmed with 10 per cent. damages and costs.

*R. L. Walpole* and *K. Ferguson*, for the appellant.

*W. Wallace* and *B. Harrison*, for the appellee.

ANDERSON v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

WILLIAMS v. THE SAME.

Thursday,  
June 7.

APPEAL from the *Greene* Circuit Court.

*Per Curiam*.—The questions raised in this case are decided in that of *O'Donald* against the same appellees, at this term (1).

The judgment is affirmed with 3 per cent. damages and costs.

*J. N. Evans*, for the appellant.

(1) *Ante*, 259.

BENFIELD v. REYNOLDS and Others.

Thursday,  
June 7.

APPEAL from the *St. Joseph* Court of Common Pleas.

*Per Curiam*.—The appellant in this case having failed to file a brief, though the cause was submitted at the *May*

term, 1858, the appeal will be dismissed. See Rule 28 of this Court; Ind. Dig., 722.

The appeal is dismissed with costs.

*A. G. Deavitt*, for the appellant.

*T. S. Stanfield* and *J. A. Liston*, for the appellees.

May Term,  
1860.

HILL  
v.  
JONES.

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HILL and Another v. JONES.

In a suit upon a note and mortgage, the defendant pleaded a written release, alleging that the release was lost. Reply in denial, without verification by oath. *Held*, that although the want of a verification might, perhaps, excuse proof of the execution of the release, the reply was still effectual as a traverse of all other material averments in the answer.

APPEAL from the *Grant* Circuit Court.

Thursday,  
June 7.

DAVISON, J.—This was an action by *Jones* against *Jackson* and *Milton Hill*, to foreclose a mortgage given to secure the payment of a promissory note. The note bears date *June* 11, 1857, and is for the payment of 106 dollars.

Defendants' answer contains three paragraphs—

The first alleges that the plaintiff, on the 4th of *March*, 1858, executed to the defendants a written release in full discharge of the debt specified in the note and mortgage, which release has been lost or destroyed, so that the same cannot be produced, &c.

The second and third paragraphs make no point in the case, and will not, therefore, be further noticed.

Plaintiff replied by a general denial; but his reply is not verified by oath.

The Court tried the cause, and found for the plaintiff. New trial refused, and judgment, &c.

The appellants seek a reversal upon the ground that the reply being general, and not sworn to, it is not applicable to the defense; that it should have been verified by oath, or have been special as to the loss or destruction of the release.

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1860.

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HILL  
v.  
JONES.

The ground thus assumed is untenable. The statute says: "Where a writing, purporting to have been executed by one of the parties, is the foundation of, or referred to in, any pleading, it may be read in evidence on the trial of the cause against such party without proving its execution, unless its execution be denied by affidavit before the commencement of the suit, or unless denied by pleading under oath. The party shall, in all cases, have inspection of the instrument of writing before pleading." 2 R. S. p. 44, § 80.

We are referred to this statutory rule; but it is at least doubtful whether the rule applies at all to the case at bar. It seems right that a party should have inspection of the written instrument, before he swears to the pleading which denies its execution; but such inspection cannot be had in cases where the suit is founded upon a lost note. *Clark v. Falkner*, 1 Blackf. 218. But suppose the rule to be applicable, it does not follow that the reply in this case is objectionable. Not being verified, it excused proof of the execution of the release. That, however, did not render it ineffective as a traverse of all other material averments in the defense. This position is sustained by various authorities. *Bates v. Hunt*, 1 Blackf. 67.—*Hager v. Mounts*, 3 *id.* 261.—*Fosdick v. Starbuck*, 4 *id.* 417.—*Kirkpatrick v. The State*, 3 Ind. R. 521.—*Buchanan v. Port*, 5 *id.* 264.—*Unthank v. The Henry County Turnpike Co.*, 6 *id.* 125.—*Riser v. Snoddy*, 7 *id.* 442. And the result is, the reply was well pleaded without a verification.

The evidence not being in the record, we must presume that the finding was in accordance with its weight.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*I. Van Devanter and J. F. McDowell*, for the appellants.

KORTPETER *v.* TALBOTT and Others.May Term,  
1860.McCULLOUGH  
*v.*  
THE STATE.RIVET *v.* THE SAME.APPEAL from the *Marion* Circuit Court.Thursday,  
June 7.

*Pet Curiam.*—The objections to the judgment in this case are based upon matter of fact, not of law. The record does not sustain the objections.

The judgment is affirmed with 3 per cent. damages and costs.

*R. L. Walpole* and *K. Ferguson*, for the appellants.

*A. A. Hammond*, for the appellees.

McCULLOUGH *v.* THE STATE, on the relation of WILSON.

In a prosecution for bastardy, the credibility of the mother of the child is necessarily a question for the jury, in weighing her testimony.

APPEAL from the *Clay* Circuit Court.Thursday,  
June 7.

DAVISON, J.—This was a prosecution for bastardy. The affidavit constitutes the complaint.

Defendant answered by a general traverse. There was a verdict against him, upon which the Court, having refused a new trial, rendered judgment.

The record contains a bill of exceptions, which shows that the relator was the only witness who testified as to the defendant's guilt. She testified, *inter alia*, that the child was begotten on *Tuesday*, after the fourth *Monday* in *May*, and was born on the 10th of *February* thereafter, making the period of gestation eight months and ten days; that she was astride of the lap of defendant when it was begotten; and that that was the only occasion on which she ever had sexual intercourse.

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1860.

The evidence being closed, the defendant moved the following instruction:

McCULLOUGH  
v.  
THE STATE.

"In this case, the credibility of the prosecuting witness is in question; and if the jury believed her testimony incredible as to time and place, and the manner in which she alleges the child was begotten, they should find for the defendant."

The Court refused thus to instruct the jury, but instructed as follows:

"Under our practice, the credibility of the witness is not, necessarily, in issue, unless brought in issue by impeachment, or the manner of the witness, or the probability of her statement."

The action of the Court relative to these instructions, raise the only points relied on in the defendant's brief.

In cases of this sort, the prosecuting witness, being the mother of the illegitimate child, is clearly interested in the event of the suit; because, in the event of a conviction, the defendant is adjudged the father of the child, and stands charged with its maintenance and education; but should he be acquitted, the witness, being its mother, would, of course, be obliged to maintain and educate her own child. This, then, is an interest that directly affects the credit of the witness, and, in this respect, her credibility is, in our opinion, necessarily in question before the jury; hence, it was error in the Court to refuse so to instruct them. In the absence of any statutory rule on the subject, she would have been incompetent on the ground of interest. 2 R. S. p. 485, § 3.—1 Phil. Ev. (5th Am. ed.) note 20, p. 40. But, as the rule now stands, though the mother of the bastard is allowed to testify, still it is the duty of the jury, in weighing the testimony, to consider her interest in the result of the prosecution. 2 R. S. pp. 80, 83, §§ 238, 243.

We are of opinion that the instruction given, so far as it tells the jury that "under our practice the credibility of the witness is not necessarily in issue," was erroneous, and may have misled the jury.

*Per Curiam.*—The judgment is reversed with costs,  
Cause remanded, &c.

*J. P. Usher*, for the appellant.

*T. H. Nelson*, for the state.

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1860.

CASSEL  
v.  
CASE.

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CASSEL, Administrator, v. CASE and Others.

Persons not parties to a judgment cannot maintain proceedings to review it or set it aside.

The widow and heirs of a decedent cannot maintain proceedings to have letters of administration revoked, and a sale of the decedent's lands set aside, on account of alleged fraud and collusion in the recovery of a judgment, to which they were not parties, and for the payment of which the sale was made.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Thursday, June 7.*

DAVISON, J.—*Christian Cassel*, administrator of *Lorenzo Westgate*, deceased, filed a petition in the Common Pleas, representing that there was no personal property belonging to the estate of the intestate; that the claims against his estate on file in said Court, and admitted by the administrator, amount, in the aggregate, to 800 dollars; that he died seized of certain real property (describing it), and at his death left *Marietta Westgate*, now *Marietta Case*, his widow, and *William R.* and *Mary Westgate* his heirs at law. The relief sought was, that the lands be sold and made assets, &c. The widow and heirs being non-residents of the state, were notified by publication; the lands were appraised, and other legal proceedings having been had in the cause, the Court, at its *September* term, 1855, made an order directing said lands to be sold, and the proceeds thereof to be made assets in the hands of the administrator, for the payment of debts, &c.

After the rendition of this order, viz., on the 22d of *December*, 1855, the Court being then in session, the widow and heirs appeared and filed their petition, alleging, *inter alia*, that the application of the administrator which re-

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CASSEL  
v.  
CASE.

sulted in the order to sell, &c., was founded on a judgment for 798 dollars, obtained in said Court against the intestate's estate by one *Thomas Benbridge*, by fraud, in this, that the intestate, at his death, was not indebted to *Benbridge* in any sum whatever, nor was he a creditor of said estate; that he procured *Cassel* to become administrator for the mere purpose of procuring said judgment without opposition; and that the same was procured upon an account and note filed in said Court on the 26th of *April*, 1855, which is as follows:

“Estate of *Lorenzo Westgate*, deceased, to *Thomas Benbridge*, Dr:

1836. To your half the purchase-money advanced you for the purchase of two and a-half acres of land adjoining the town of <i>Lafayette</i> , at 800 dollars .....	\$400 00
1836. To your half the purchase-money advanced you for the purchase of the east half of north-east quarter of section 7, township 23 north of range 3 west, at 300 dollars .....	150 00
To your proportion of taxes paid on above land, from 1836 to 1854 inclusive .....	55 36
To taxes paid for you on forty acres of land in <i>Warren</i> county, from 1836 to 1854 inclusive...	15 58
To amount of note, dated <i>October</i> 12, 1840, for 97 dollars, 65 cents—less credit 3 dollars, 93 cents..	93 72
To interest on the same 93 dollars, 72 cents, from date to <i>July</i> 1, 1855 .....	83 19
	<hr/>
Balance due .....	\$798 35

The note reads thus—

“*Lafayette*, *October* 12, 1840. One day after date, I promise to pay to the order of *Thomas Benbridge*, 97 dollars, 60 cents, value received on settlement.

[Signed] “*L. Westgate*.”

• Indorsed—“Credit, *January* 1, 1843, 3 dollars, 93 cents.”  
This account was verified by the affidavit of *Benbridge*. It is averred that no evidence was offered or given to the Court in support of the claim, save the affidavit of *Ben-*



*bridge* appended to the account, and the testimony of one *Mix*, who testified that the intestate had left this state in the year 1840, and had not, within the knowledge of witness, been within this state since that time; that the petitioners had no knowledge of the granting of the letters of administration on the intestate's estate, or of the rendition of said judgment, or of the proceeding to sell said real estate, until the last few days; and it is further averred that the whole of the above claim, at the time it was filed, was barred by the act of limitations of *Illinois*, of which state the intestate, at the time of his death, was, and for several years prior thereto had been, a citizen. The prayer is that *Cassel* and *Benbridge* be made defendants, &c.; that the letters of administration granted to *Cassel* be set aside; that the judgment in his favor be reviewed, reversed, and annulled; and that the order directing the sale of the land be vacated, &c.

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CASSEL  
V.  
CASE.

Defendants, at the proper time, moved to reject the petition; but their motion was overruled, and thereupon they answered—

1. That they deny all fraud charged against them.

2. As to so much of the petition as relates to the statute of limitations, they say that the debt was contracted in this state; that the several causes of action stated in the account are not, nor is either of them, within the act of limitations of this state, and they deny that the statute of limitations of any other state has anything to do with this case.

Upon final hearing, the Court refused the prayer of the petition, &c.

It may be noted that the case stated in the petition is rested exclusively upon the ground that the judgment against the administrator was unjustly and irregularly obtained. Unless, then, the petitioners had a right to have the judgment so obtained reviewed and set aside, they were not entitled to any of the relief sought by their petition.

The appellees insist that the petitioners had no right to such review. The statute says: "Any person who is a

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party to any judgment, or the heirs, devisees, or personal representatives of a deceased party, may file in the Court where such judgment was rendered, a complaint for a review of the proceedings and judgment, at any time within three years next after the rendition thereof." 2 R. S. p. 165, § 586.

This enactment at once shows that the petitioners not being parties to the judgment which they seek to review, were not entitled to the relief sought. Whether, upon the case made by the petition, they could sustain a suit against the administrator and his sureties on his bond, is a question not before us. It is, however, evident that, in the proceeding before us, they have misconceived their remedy.

*Per Curiam*.—The judgment is affirmed with costs.

*E. H. Brackett* and *J. O'Brien*, for the appellant.

*R. C. Gregory*, for the appellees.

### THE STATE v. CONGER.

Gaming is not an act of common labor or usual avocation within the prohibition of the *Sunday* law.

Thursday,  
June 7.

APPEAL from the *Ripley* Court of Common Pleas.

DAVISON, J.—Information for violation of the *Sabbath*. The charge is, that the defendant, on the 5th of *July*, 1857, at, &c., was then and there unlawfully found at common labor and engaged in his usual avocation, by then and there playing and betting at a certain game of cards with *Lewis L. Thomas* and *John Risinger*, for the sum of twenty-five cents, the said common labor not being the work of necessity or charity, &c.

Motion to quash the information sustained, and the state excepted.

The statute upon which this prosecution is based, declares that if any person, &c., shall be found on the first

day of the week, commonly called *Sunday*, rioting, hunting, fishing, quarreling, at common labor, or engaged in his usual avocations, works of charity and necessity excepted, &c., he shall be fined, &c. Acts of 1855, p. 159.

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The appellee, in support of the action of the Court, assumes that gaming is not an act of common labor or a usual avocation, within the purview of the statute. This construction seems to be correct. Gaming is an offense defined by statutory law—it is a criminal act—the doing of which on any day of the week is forbidden; and it seems to us that an act thus forbidden cannot be held an act of common labor or of usual avocation, because the ordinary sense in which these phrases are understood will not allow them to be so construed. In our opinion, the terms common labor and usual avocation, as used in the statute, intend such acts of labor or business as may be performed on days of the week usually devoted to secular business in the pursuit of a lawful employment. Such acts of common labor and usual avocation, and such alone, when done on the *Sabbath*, are punishable as offenses against the statute. The motion to quash was correctly sustained.

*Per Curiam.*—The judgment is affirmed.

*G. Durbin*, for the state.

*a decision which defeats the purpose of the statute. It is a result of the "gaming" which is a violation of the Sunday law. It is a legislative provision.*

BLACK v. MITCHELL.

APPEAL from the *Owen* Court of Common Pleas.

Thursday,  
June 7.

PERKINS, J.—Suit by *Black* against *Mitchell* upon two promissory notes. The notes were given to one *J. R. Riddle*, and by him assigned to the plaintiff.

The defendant set up a want and a failure of consideration, and fraud.

The plaintiff replied an *estoppel in pais*, in this, that the plaintiff took the assignment of the notes for a considera-

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MITCHELL.

tion paid, and upon the representation of the defendant made during the negotiation therefor that the notes were valid.

Trial by jury; verdict and judgment for the defendant.

The evidence is upon the record. The notes were given to Dr. *Riddle*, for services to be subsequently performed by him. They were undoubtedly obtained by false pretenses, and the services promised, useless as they would, it is true, have been, were never performed.

As between the payee and the maker, the verdict of the jury was undoubtedly right.

Was the estoppel to set up the defense as against the plaintiff established?

To make out such an estoppel, it must appear that the notes were purchased on the faith of the representation. *Powers v. Talbott*, 11 Ind. R. 1.—2 Smith's Lead. Cases, pp. 534, 535. This does not sufficiently appear.

Again, in this case, as we have seen, the notes were given upon an executory consideration. The services which were to constitute it had not been performed when the assignment of the notes was taken, and the assignee knew the fact; and, further, that the notes were obtained by fraud. He knew more about that than the maker of the notes himself; for the maker appears to have been an ignorant, simple-hearted man, while the payee of the notes was an itinerant quack oculist, a fact known to the plaintiff in this suit, and not known to the defendant; in addition to which, the plaintiff knew the manner in which the notes had been obtained.

Under these circumstances, he cannot rely upon the estoppel pleaded.

*Per Curiam*.—The judgment is affirmed with costs.

*A. Daggy* and *D. E. Williamson*, for the appellant.

THE CITY OF LAFAYETTE, ASHER and DORSEY v. SPENCER and Another.

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THE CITY OF  
LAFAYETTE  
v.  
SPENCER.

*Snyder v. The President, &c., of Rockport*, 6 Ind. R. 237, affirmed.

Sections 59 and 60 of the general act for the incorporation of cities, Acts of 1857, p. 61, do not entitle the owners of property that will be injured by street improvements to have compensation for such injury assessed and tendered before the contemplated improvements proceed.

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APPEAL from the *Tippecanoe* Circuit Court.

Thursday,  
June 7.

HANNA, J.—The appellees aver that they are severally the owners of lots fronting on *Ferry* street, in *Lafayette*; that the appellants are proceeding to alter said street along and in front of said lots, and to construct sidewalks, &c., and declare their intention, in so doing, to excavate the earth in said street, in front of said lots, to the depth of from one to six feet; that the work is already commenced, and will greatly damage said plaintiffs, by causing the earth and fences of plaintiffs adjoining said street to fall into the said street, and by rendering said lots less easy of access, and leaving their surface so high above the said street that to construct buildings on a line therewith great expense will have to be incurred in cutting the same down, and damage result from cutting shade-trees and shrubbery; that to maintain the same from falling into the street, much expense will have to be incurred in erecting walls, &c.; that there has been no assessment of damages, nor compensation made or tendered, &c. There was a prayer for an injunction.

Answers, &c., were filed, which fairly presented the question whether the city, under the general law for the incorporation of cities, of *March* 9, 1857, can so excavate or raise a street, as to seriously damage the owners of lots adjacent, by decreasing the value thereof, without being liable to such compensation.

The Circuit Court granted an injunction.

The appellants insist that whilst acting within the powers conferred upon them by the statute, and there being no abuse of that power charged against them, they are not

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liable for consequential damages resulting from such acts. We are referred to *Snyder v. The President, &c., of Rockport*, 6 Ind. R. 237, and authorities upon which that case rests.

The appellees contend that the statute (Acts of 1857, p. 61, §§ 59, 60) enlarges their rights over those possessed under the law which obtained at the time the decision in 6 Ind. was made; but if not, we are then asked to review that decision, on the ground that it is in conflict with art. 1, § 21, of the constitution.

We do not believe that the statute referred to is such as to require the appellants, in the case at bar, as presented by the record, to cause to be assessed and tendered a compensation before they proceeded in the contemplated improvement. The case referred to in 6 Ind. appears to be decisive of this. We are not convinced that the decision in that case is not founded on reason and authority.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*S. A. Huff, R. Jones, and G. Gardner*, for the appellants.  
*R. C. and J. Gregory*, for the appellees.

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#### DEV OSS v. JAY and Others.

Thursday,  
June 7.

APPEAL from the *Randolph* Circuit Court.

*Per Curiam.*—This case was heretofore before this Court. 9 Ind. R. 366. The record now shows, by an entry *nunc pro tunc*, that the ruling of the Court on the demurrer was excepted to. It is also by agreement made to show that the defendants raised questions as to the jurisdiction of the Court, as to the service of process, and also on a motion to strike out parts of the complaint. Upon these facts, the appellees assign cross-errors. They also, in answer to the assignment of errors, pleaded the former decision in the case in this Court; to which the plaintiff

replied that it was not upon the merits, but upon the technical point of a failure to except, &c. There is an agreement that the question whether the former decision is a bar shall be by us considered and decided as if, &c. No notice was given of the motion for the *nunc pro tunc* entry.

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Several questions are discussed by counsel; but, in view of the conclusion we have arrived at in reference to the former judgment of this Court, we will not notice them further.

The judgment of the Court below, from which the former appeal was taken, was by this Court affirmed. Now another appeal is here from the same judgment, but the record has been perfected since that decision, so as to present points that could not be then considered. This Court then passed upon all points that could be raised upon the record, as the parties chose to submit it. Then was the time to perfect the record, before the judgment of this Court was pronounced. If parties elect to take the opinion of the Court upon an imperfect record, we cannot see where litigation would end, if, by supplying some omitted part of the record, they could again bring another and another appeal from the same judgment. The question whether the record would be a bar to another suit is not before us.

The appeal is dismissed.

*J. Smith*, for the appellant.

*W. March*, for the appellees.

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BEAUCHAMP v. LEAGAN.

APPEAL from the *Putnam* Court of Common Pleas. *Friday,*

*June 8.*

*Per Curiam*.—Suit to foreclose a mortgage. The mortgage was given to secure five notes. Three of them had been paid. A certain amount of usurious interest had

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INGILL.

been paid on those notes, voluntarily, at the time of their payment, for the period they had run past due.

The two remaining notes, to enforce payment of which the mortgage was foreclosed, were due when the suit was commenced. This is shown by the mortgage and admitted by the answer. On these two notes, an agreement had been made to give time, but no certain time, on the payment of usurious interest. No such interest, however, was paid, and the agreement to pay it was void, and no bar to a suit for foreclosure. *Shaw v. Binkard*, 10 Ind. R. 227.

The Court deducted, on rendering the judgment on the mortgage for the last two notes, the amount of usurious interest, with 10 per cent. thereon, paid on the former notes. The Court gave the plaintiff costs. This was right, as the notes involved in the suit were not usurious.

The Court ordered the land mortgaged to be sold in parcels, such as it was found to be divisible into. This was right.

The case was fairly tried on its merits.

The judgment is affirmed with 5 per cent. damages and costs.

*D. M' Donald*, for the appellant.

*D. E. Williamson* and *A. Daggy*, for the appellee.

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SPEARS and Wife v. FEATHERINGILL.

Friday,  
June 8.

APPEAL from the *Johnson* Court of Common Pleas.

*Per Curiam*.—Suit on a note given by the wife while sole.

Answer in three paragraphs. The second and third were stricken out on motion of the plaintiff. They appear in the transcript, but were not made a part of the record by bill of exceptions. We cannot consider them, as they are not properly before us, as we have often decided.



The first paragraph of the answer was a failure of consideration, in this, that the note was given for lands sold by plaintiff to the female defendant; that at the time of the sale, said plaintiff had no title to said lands (describing them), nor has he now, nor has he at any time since had.

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KALB.

Reply, denying that the consideration of the note was the land described in the answer.

A motion was made to strike out the reply, because it did not meet the whole answer, or take issue thereon. It was properly overruled. It was immaterial whether the plaintiff ever had title to the lands described, if the same were not the consideration for the note sued on.

There was an averment in the complaint, of the marriage of defendants, which was not denied; no proof was, therefore, necessary upon that point.

The pleadings did not put in issue the title to lands, so as to oust the Common Pleas of jurisdiction. *Harvey v. Dakin*, 12 Ind. R. 481.

The judgment is affirmed with 5 per cent. damages and costs.

*F. M. Finch*, for the appellants.

*G. M. Overstreet* and *A. B. Hunter*, for the appellee.

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THE STATE v. KALB.

14 403  
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The offense of selling liquor to a minor is, the sale to the minor, not believing or having reason to believe him to be an adult.

A person prosecuted for the offense, may show that the person sold to was a stranger to him, and that his personal appearance would lead a person of common observation to believe him an adult, and that he represented himself as such; or if he know the person, but not his age, he may show that he is treated by his parents, his friends, and the community, as an adult.

APPEAL from the *Gibson* Court of Common Pleas. *Friday,*

PERKINS, J.—Prosecution for selling liquor to a minor. *June 8.*

Acquittal.

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V.  
KALB.

On the trial, the Court permitted the defendant to prove that *James Welborn*, the minor to whom the liquor was sold, had the personal appearance of a man over twenty-one years of age.

This is complained of as error.

The statute prohibits the sale of liquor to a minor, and authorizes the sale to adults. It does not prescribe the mode by which the liquor-seller is to determine the question of age, and it may often be a difficult one.

Is the seller to ask every purchaser his age? Very well. Suppose the answer states it falsely, and the seller is thus led to sell to a minor? Again, is the seller to trace out the parents of every person, and inquire of them. Suppose they give false information, and thereby liquor is sold to a minor. The state is not the party giving the false information, and, hence, would not be estopped to prove, on the trial, the true age of the person to whom the liquor was sold. What rule must govern on this point? We think it must be that of belief. We think the offense consists in selling to a minor, not believing, or having reason to believe him to be an adult. *Prima facie*, the seller would be presumed to know, under the law, whether the person he sold to was a minor or an adult; and, in a case of doubt, he would, if he sold, take the hazard. But we think he might be permitted to show, on a prosecution for selling to a minor, that the person was a stranger to him, and that his personal appearance would lead any person of common observation to believe him, beyond doubt, an adult—that he represented himself as such, &c. So he might prove that a person whom he did know (but not his age), was treated by his parents or friends, and the community, as an adult. Such evidence would be for the jury to consider.

*Per Curiam*.—The judgment is affirmed.

*W. P. Edson*, for the state.

## MEDLER v. HIATT.

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MEDLER  
v.  
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*Barnard v. Graham, ante, 322, followed.*

Where affirmative matter in the reply covers the whole answer, and is sustained by a special verdict, the plaintiff is entitled to judgment.

Where the amount of damages could be ascertained by mere computation, and the jury having failed to make an assessment, the Court assessed the damages, it was *held*, that, the merits of the cause having been properly determined, the judgment would not be reversed.

APPEAL from the *Randolph* Circuit Court.

*Friday,*  
*June 8.*

WORDEN, J.—Suit by *Hiatt* against *Medler* on two promissory notes.

The defendant answered, in substance, that the notes were given for a piece of land (describing it) sold by the plaintiff to the defendant, and conveyed by deed containing covenants of seizin, against incumbrances, and of general warranty. A copy of the deed is set out. It is averred that there was a stream of water running through the land, and a mill-dam on the stream below the land, backing the water in the stream, and causing it to overflow the land, and “that the right to so back the water on the said land, and to so injure it, and make it sickly, soft, and spongy, had been obtained of *Jethro Hiatt*, deceased, a former owner of the land, in his lifetime, and was an easement and incumbrance existing on said land at the time of said conveyance, and still exists thereon, whereby the defendant is damaged to the amount of 500 dollars, by reason whereof the consideration of the notes has failed.”

The plaintiff replied, denying that any right had been obtained to overflow the land; and averring affirmatively “that at the time the defendant received his said deed for said land, it was verbally agreed and well understood between the parties that said defendant was to receive his said deed for said land subject to any incumbrance that might exist by reason of the existence of said dam, and the right claimed to flow back the water thereon, and that said agreement entered into and was a part of the consideration thereof.”

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v.  
HIATT.

No objection was made to the replication. It seems to have been drawn with a view to the decision of this Court in the same cause, when before in this Court. *Vide* 8 Ind. R. 171.

The cause was submitted to a jury for trial, who returned a verdict in answer to interrogatories, as follows:

"In answer to the first interrogatory, we, the jury, find for the plaintiff that the right to flow water did exist, but not such that defendant could not revoke.

"In answer to the second interrogatory, we, the jury, find for the plaintiff that the said defendant bought the land with a knowledge of, and subject to, the incumbrance on said land, in consideration of the purchase-money.

*"James Griffis, foreman."*

The defendant moved for a new trial, for the reasons—

1. "That the verdict is not sustained by sufficient evidence, and is contrary to law."

2. "For error of law occurring at the trial, and excepted to at the time by the defendant."

The motion was overruled, and exception taken.

The defendant then moved for judgment in his favor for costs, notwithstanding the verdict; and upon this motion being overruled, he moved in arrest of judgment, which was also overruled. To this ruling exception was taken.

The Court then rendered judgment in favor of the plaintiff for 246 dollars, 40 cents, the amount of the notes and interest; and to this the defendant excepted.

There are eight errors assigned, four of which relate to the rulings of the Court upon the trial of the cause. No question is properly before us in relation to these rulings, as they were not properly made the basis of the motion for a new trial.

The second reason for a new trial is too vague and indefinite to raise any question. It should have pointed out the particular errors relied upon, so that the attention of the Court might have been directed to them. This point was settled in the case of *Barnard v. Graham*, at the present term (1).

The fifth error assigned is, that the Court erred in refusing to grant a new trial. We cannot disturb the verdict of the jury on the evidence, as that, in our opinion, tends at least to support the verdict.

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HIATT.

The sixth, seventh, and eighth errors assigned, are upon the rulings of the Court in refusing to render judgment for the defendant for costs, notwithstanding the verdict; in refusing to arrest the judgment; and in rendering judgment for the plaintiff for the amount of the notes and interest.

The verdict we regard as decisive of the matter in controversy, and the rights of the parties, although it was not general, either for the plaintiff or defendant. It finds, in substance, as we understand it, that the defendant bought the land with a knowledge of the existence of the incumbrance and subject thereto, and that this was a part of the consideration for the purchase of the land. In short, it finds the affirmative matter set up in the replication substantially for the plaintiff.

The code provides (§ 371), that, "where the verdict is special, or where there has been a special finding on questions of fact, the Court shall render the proper judgment."

What was the proper judgment to be rendered upon the verdict in this case? It was, clearly, that the plaintiff recover the amount of his notes and interest; because the defense totally failed. There was no general denial or defense set up other than that above mentioned. The affirmative replication covered the whole defense, and as that was found for the plaintiff, it follows that he was entitled to judgment.

It is insisted that as the jury did not assess the plaintiff's damages, the Court had no right to render judgment in his favor for such damages. There was no controversy as to the amount due upon the notes, unless the defense set up should succeed. The amount depended upon computation merely. It is true, the statute provides that in actions for the recovery of money, the jury must assess the amount of the recovery. Code, § 388. The Court, perhaps, should, upon the return of the verdict, no assess-

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ment being therein made, have directed the jury to assess the amount due upon the notes; but it does not appear that the defendant objected to the assessment being made by the Court. Another section of the code (367) authorizes the Court, in certain cases, to make the assessment. Independently of the provisions of our statute, when the jury, upon the trial of an issue, omit to assess the damages, the omission may, in some instances, be supplied by a writ of inquiry. 1 Tidd's Pr., 574.

Whatever may have been the correct mode of proceeding in this case, in reference to the assessment of damages, we are satisfied that the defendant cannot now complain that the assessment was made by the Court, which was virtually done by rendering judgment for the amount of principal and interest, no objection having been made in this respect in the Court below. In none of the motions there made, or objections taken, by the defendant, was the omission of the jury to assess the damages, or the assessment thereof by the Court, assigned as the ground of the motion or objection; and we think it too late to make the objection, for the first time, in this Court. Besides, this is a purely technical objection, not in any manner going to the merits of the cause. The damages depended upon computation merely, and the defendant was not in any manner injured by the fact that the computation was made by the Court and not by the jury. The statute provides that no judgment shall be reversed, "where it shall appear to the Court that the merits of the cause have been fairly tried and determined in the Court below." 2 R. S. p. 163. —*Riley v. Murray*, 8 Ind. R. 354.

We find no error in the record for which the judgment should be reversed.

*Per Curiam.*—The judgment is affirmed with costs.

*J. Smith*, for the appellant.

*W. A. Peelle* and *T. M. Browne*, for the appellee.

(1) *Ante*, 322.

THE STATE on the relation of PARISH GROVE TOWNSHIP  
v. STANLEY.

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v.  
STANLEY.

Where the inhabitants of a township had received a part of the purchase-money of school lands, and interest for several years on the balance, and expended the money for the purposes contemplated by the grant, and the purchaser had taken possession and made valuable improvements, *held*, that they must be deemed to have acquiesced in the sale, and that they are estopped to deny its validity.

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131	29
14	409
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14	409
141	179
141	676

APPEAL from the *Benton* Circuit Court.

Friday,  
June 8.

WORDEN, J.—This was an action by the appellant against the appellee, to recover possession of a part of the school section of land in the township named.

The defendant answered, admitting that on the 7th of *June*, 1849, the land belonged to the inhabitants, &c., and averring that on that day the auditor of the county, who was *ex officio* school commissioner, sold the same to *William T. Rowe*, and issued to him a certificate of purchase therefor, which certificate is set out, and shows that the land was sold for 400 dollars, 100 dollars of which was paid down, and the interest on the remainder of the purchase-money, for one year, paid in advance. The certificate appears to be in the usual form. It is averred that the sale thus made was approved by the board of commissioners of the county, at the *August* session thereof for the year 1849. It is further averred that *Rowe* immediately took possession of the land by virtue of his purchase and the certificate thereof, and made lasting and valuable improvements thereon; and that annually since the purchase, said *Rowe*, and the defendant in his behalf, have paid the interest in advance on the remaining 300 dollars of the purchase-money, at the rate of 7 per cent. per annum, making, in all, 189 dollars interest paid to the officers having charge of the school funds of the county; which interest, together with the 100 dollars principal paid at the time of the purchase, has been duly disbursed for the use of the schools in said congressional township; that no part of the same has been refunded, or offered to be returned, whereby

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v.  
STANLEY.

the sale has been ratified by the township; that the defendant, on the first of *January*, 1854, entered into possession of the land by virtue of an arrangement with said *Rowe*, and now claims to hold the same under and through his title so derived as aforesaid; wherefore, &c.

The plaintiff demurred to the answer, because—

1. It did not show that the auditor had any legal authority to sell the lands.

2. It did not show that the land had been previously offered for sale to the highest bidder according to law.

3. It did not show that a division of said land into lots to suit purchasers had even been made by the trustees.

4. It did not show that a minimum price had been affixed by the trustees, below which it could not be sold.

5. It did not show that a sale of the lands had been consented to by the inhabitants of the township, according to the mode prescribed by law.

The demurrer was overruled, and exception taken, and final judgment was rendered for the defendant.

The question involved is, whether the Court ruled correctly on the demurrer.

By the law in force when the sale in question was made, five qualified voters of the township might petition the trustees for the sale of the land, whereupon if a majority of the voters of the township vote for such sale, not being less than fifteen in number, it is made the duty of the trustees—1. To divide the lands so voted to be sold into such lots as will insure the best price; 2. To affix a minimum price to each lot, not less than one dollar and twenty-five cents per acre, below which it shall not be sold; 3. To certify such division and appraisement to the proper county auditor, together with a copy of all their proceedings had in relation to the sale of said lands. The lands are to be first offered at public sale, and “when any land shall be offered for sale, and shall remain unsold, the county auditor may dispose of the same at private sale, for the best price that can be had therefor, not being less than the minimum price affixed thereto.” The land is to be sold upon the terms of paying one-fourth of the purchase-



money down, and the balance in twenty-five years, the interest being paid annually thereon in advance; and the purchaser, until forfeiture, is entitled to all the rights of possession before existing in the township. R. S. 1843, p. 261.

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STANLEY.

The answer seems to be entirely sufficient, unless it was necessary to show, by direct allegation, that all the preliminary steps had been taken to authorize the sale. From the view we take of the case, we deem it unnecessary to decide how far it will be presumed that the necessary preliminary steps had been taken. Perhaps it would be presumed that after the vote had been taken to sell the land, the other steps had been duly taken; but it is doubtful whether such vote would be presumed simply, from the fact that a sale was made by the proper officer, because this goes to a question of authority. Where a fact is necessary to confer authority, it may not be presumed, though every proper official step may be presumed after authority is shown. *Vide*, on this point, 1 Phil. Ev. (ed. 1852), pp. 604, 605.

Nor do we deem it necessary to determine how far any subsequent healing statute may be valid to protect a party purchasing school lands which had been irregularly sold, or sold without authority.

The answer sets up facts which we think estop the plaintiff to deny that the land was regularly and properly sold, or to question the authority to sell it. It is averred that the purchaser took possession immediately, and has made valuable improvements thereon; that the part of the purchase-money paid down, and the interest paid annually on the portion unpaid, have been duly disbursed for the use of the schools in the township, the object for which the grant of the land was made by the federal government to the inhabitants of the township; that the money thus paid and disbursed has not been refunded, or offered to be refunded. The inhabitants of the township, then, have received the money thus paid; and have received and used it for the purposes intended by the original grant to them. The "inhabitants" must be presumed to have been cogni-

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STANLEY.

zant of the fact that the purchaser took possession and made the alleged improvements, and they, having received the benefit of the portion of the purchase-money paid down, and the annual interest on the portion unpaid, for so long a time, must be deemed to have acquiesced in the sale, and are estopped from questioning the regularity or the validity thereof.

A summary of the law, as applicable to this point, may be found in 2 Smith's Lead. Cases (5th Am. ed.), pp. 662, 663. The author observes that "when those who are entitled to avoid a sale, adopt and ratify it, by receiving the whole or any part of the purchase-money, equity will preclude them from setting it aside subsequently, for reasons which are too plain for statement. *Stroble v. Smith*, 8 Watts, 280.—*The Commonwealth v. Shuman's Adm'rs*, 6 Harris, 343.—*Smith v. Warden*, 7 *id.* 424. 'Where a sale is made of land,' said LEWIS, J., in *Smith v. Warden*, 'no one can be permitted to receive both the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired. It was held by this Court, in *The Commonwealth v. Shuman's Adm'rs*, that equitable estoppels of this character apply to infants as well as adults, to insolvent trustees and guardians, as well as to persons acting for themselves, and have place as well where the proceeds arise from a sale by authority of law, as where they spring from the act of the party.'" *Vide*, also, on the general subject, *Laney v. Laney*, 4 Ind. R. 149; *Gatling v. Rodman*, 6 *id.* 289; *The State v. Sickler*, 9 *id.* 67.

We are of opinion that the demurrer to the answer was correctly overruled; hence, the judgment must be affirmed.

*Per Curiam*.—The judgment is affirmed with costs.

*D. Mace*, for the state.

*H. W. Chase* and *J. A. Wilstach*, for the appellee.

*Ex Parte* SHOCKLEY, Guardian.May Term,  
1860.

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*Ex Parte*  
SHOCKLEY.

The Court of Common Pleas of a county, has original and exclusive jurisdiction in all matters relating to the probate of last wills and testaments, which are properly admitted to probate in that county; to the granting of letters testamentary, of administration, and of guardianship, where such letters are properly to be granted in that county; to the settlement and distribution of decedents' estates and the personal estates of minors, where such settlement and distribution are properly to be made in that county; of all actions against executors and administrators appointed in that county; and to authorize guardians to sell and convey real estate of their wards, where such guardians are appointed in that county, whether the real estate lay in that or in another county.

APPEAL from the *Bartholomew* Court of Common Pleas. *Friday,*  
*June 8.*

WORDEN, J.—*Shockley* was appointed guardian of the above-named wards by the Court of Common Pleas of *Hancock* county. He filed his petition for the sale of certain lands belonging to his wards, lying in *Bartholomew* county, in the Court of Common Pleas of the latter county. The Court dismissed the application, and refused to entertain jurisdiction of the proceedings, on the sole ground that the Court of Common Pleas of *Hancock* county, by which the letters of guardianship were granted to the petitioner, had exclusive jurisdiction in the premises. *Shockley* excepted and appeals to this Court.

The appellant insists that the Court of Common Pleas of *Bartholomew* county has jurisdiction, and relies mainly upon the fourth section of the act establishing the Court of Common Pleas (2 R. S. p. 17), which is as follows, viz.:

“The Court of Common Pleas within and for the county or counties for which it is organized, shall have original and exclusive jurisdiction in all matters relating to the probate of last wills and testaments, granting of letters testamentary, of administration, and of guardianship; of all matters relating to the settlement and distribution of decedents' estates, and the personal estates of minors; all actions against executors and administrators; to authorize guardians to sell and convey real estate of their wards;

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*Ex Parte*  
SHOCKLEY.

and the appointment of guardians of persons of unsound mind; the examination and allowance of the accounts of executors and administrators, and of the guardians of minors; except where, in special cases, concurrent jurisdiction is given by law to some other Court."

We are of opinion that a proper construction of the above section sustains the decision of the Court below, and that in this case the *Hancock* Common Pleas had exclusive jurisdiction. The provisions of this section can have no reference to matters that do not pertain to the county where the Court is to have exclusive jurisdiction. We think the following reading may be given the section, to show its meaning, without in any manner changing its effect: "The Court of Common Pleas," &c., "shall have original and exclusive jurisdiction in all matters relating to the probate of last wills and testaments," which are properly admitted to probate in that county; "granting of letters testamentary, of administration, and of guardianship," where such letters are properly to be granted in that county; "of all matters relating to the settlement and distribution of decedents' estates, and the personal estates of minors," where such settlement and distribution are properly made in that county; "all actions against executors and administrators," where such executors and administrators are appointed in that county; "to authorize guardians to sell and convey real estate of their wards," where such guardians are appointed in that county, &c.

This rendering of the statute gives exclusive jurisdiction in this case to the Common Pleas of the county of *Hancock*, where the letters were issued. It is believed to have been the practice in this state, for a long series of years, for executors, administrators, and guardians, to institute proceedings for the sale of the real estate of the decedents, or wards, in the Court where the letters testamentary, of administration, or of guardianship, were issued, whether the land lay in that or any other county in the state. This we think the correct practice under our present statutes. It is generally much more convenient, and much less expensive, than to be required to institute

separate proceedings in each county where a piece of land might happen to lie. There are many reasons why the Court granting letters should have exclusive jurisdiction to order, on petition, the sale of real estate situate in any county of the state. This, we have no doubt, was the intent of the legislature as gathered from the statutes in relation to executors, administrators, and guardians.

*Per Curiam*.—The judgment is affirmed with costs.

*R. Hill*, for the appellant.

May Term,  
1860.

JOHNSON  
v.  
CHISSOM.

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JOHNSON and Wife v. CHISSOM.

If a wife, in anticipation of the issues of her separate real property, purchase personal property, and execute a promissory note therefor jointly with her husband, the property may be taken on execution against the latter.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Friday, June 8.*

HANNA, J.—*Elizabeth Johnson* and *Abijah Johnson*, her husband, sued for the recovery of two horses, alleged to be the separate property of said *Elizabeth*.

The defendant answered by a general denial. The Court made a special finding, in writing, of the facts and conclusions of law thereon, and a general finding for the defendant.

It is insisted that the conclusion of law and the general finding and judgment are wrong, upon the special finding of the facts of the case, which was, in substance, that *Elizabeth* owned a farm, upon which the family resided; that *Abijah* was insolvent; that one *Johnson* sold the horses to *Elizabeth*, who, together with her husband, signed a note therefor; that the credit was given to *Elizabeth*; that said *Elizabeth* and *Abijah* were husband and wife, and lived together; that the horses were of the value of 335 dollars, and were levied upon by said defendant, as sheriff of *Tippecanoe* county, by virtue of an execution on a judgment against said *Abijah*, &c.

May Term,  
1860.

JOHNSON  
v.  
CHISSOM.

The record does not show any objection to the introduction of evidence.

The judgment was for the defendant, that he was entitled to the possession, and for 335 dollars.

The record shows that the property was delivered to the said *Elizabeth* by the sheriff, upon her executing a bond, &c.

The finding and judgment for the defendant is attempted to be sustained on the ground that although, by the statute of 1853, the rents and profits arising out of the real estate of the wife belong to her as her separate property; yet whenever she changes it by purchasing other property, such other property becomes the property of the husband, and is subject to his debts.

We think the conclusion of the Court was right. All the matters in evidence, and all the portions of the finding of the Court, in regard to the fact that the female plaintiff owns real estate, &c., appears to us to really have very little to do with the construction which is to be given to the contract of purchase of said horses. The plain proposition is, that a man and wife signed a note for a pair of horses. That act did not make the debt a specific charge upon her separate property. Whether she is at all chargeable, as to her separate property for that debt, is a question not before us, and about which we intimate no opinion; nor whether she could, with the issues of her property, after the same should be received, purchase other property. But what we do decide is, that the statute does not give her the power expressly to purchase and hold property, as her own, in anticipation of those issues or profits. And as the statute does not confer that power, we think the rules of law existing prior to the passage of the act still obtain, as to the purchase made in this case, under the circumstances, and that the purchase resulted in vesting the title in the husband, and subjected the property to his debts.

*Per Curiam.*—The judgment is affirmed with 2 per cent. damages and costs.

*J. M. La Rue* and ——— *Royse*, for the appellants.

ROBINSON *v.* HADLEY.May Term,  
1860.ROBINSON  
*v.*  
HADLEY.

Where several charges are given to the jury, a party asking a new trial on the ground of error in the instructions, must point out with reasonable certainty the error complained of.

APPEAL from the *Owen* Circuit Court.Friday,  
June 8.

WORDEN, J.—This was an action by *Robinson* against *Hadley*, to recover the possession of a certain piece of land. Trial by jury; verdict and judgment for the defendant.

The plaintiff appeals to this Court, and assigns for error that—

1. The Court erred in giving instructions to the jury over the objections of the plaintiff.

2. The Court erred in refusing to instruct the jury as asked for by the plaintiff.

3. The Court erred in overruling the plaintiff's motion for a new trial, and rendering judgment against the plaintiff.

The reasons filed for a new trial were—

1. That the verdict is not sustained by sufficient evidence.

2. Because the verdict is contrary to law.

3. Because the Court erred in charging the law of the case to the jury.

The counsel for the appellee insists that the third reason for a new trial is insufficient, because of its uncertainty, and we are of that opinion. What instructions were erroneous? No intimation is given of any particular error in the charges of the Court, nor does it appear whether the alleged error was in the general charge given by the Court, or those given at the instance of counsel. "The Court erred in charging the law of the case to the jury." Wherein the Court erred in charging the law of the case, is left entirely to conjecture. There were numerous charges given, some generally, by the Court, and some specially, at the instance of counsel. In such case, he who

May Term,  
1860.

SHERMAN  
v.  
CAMERON.

asks a new trial on the ground of error in charging, should, in our opinion, point out with reasonable certainty the error complained of, so that the mind of the Court may be directed to it, and not left to grope in uncertainty through the entire charges given, in search of some supposed error that may be lurking amongst them. How can the Court below be expected to review its rulings, unless attention is called to such as are supposed to be wrong? If the reason filed in this case be sufficient, one point in the rulings might be argued by counsel below, on the motion, while another and an entirely different one might be urged here—one that was not in any manner reviewed by the Court below.

The case stands as if no motion had been made for a new trial on the ground of erroneous charges, and therefore the first error assigned raises no question for our decision. *Kent v. Lawson*, 12 Ind. R. 675. The same is true of the second error. The motion for a new trial was not predicated upon the refusal of the Court to give instructions asked.

The last error raises the question whether the verdict is sustained by the evidence. Having looked through the evidence carefully, we find no cause to disturb the verdict and judgment.

*Per Curiam*.—The judgment is affirmed with costs.

*J. Perry, H. C. Newcomb, J. S. Harvey, and J. S. Tarkington*, for the appellant.

*D. McDonald and A. G. Porter*, for the appellee.

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SHERMAN and Another v. CAMERON and Another.

Friday,  
June 8.

APPEAL from the *Marion* Court of Common Pleas.

*Per Curiam*.—The appellant, *Sherman*, was the lessor, and the appellees the lessees, of certain premises. During the time the lessees were occupying, under the lease, *Sher-*



*man* caused *Helwig*, the other appellant, to tear out a brick wall of the house so occupied by the appellees for a book and job printing office.

May Term,  
1860.

CLINE  
v.  
INLOW.

Damages were claimed for this act by the lessees. Trial by a jury; verdict and judgment for 100 dollars.

The evidence tends to sustain the verdict, and whatever we might decide upon that evidence if we were sitting as triers, we cannot, under repeated decisions of this Court, disturb the verdict now.

The only question made is upon the sufficiency of the evidence.

The judgment is affirmed with 1 per cent. damages and costs.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellants.

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CLINE v. INLOW.

APPEAL from the *Montgomery* Circuit Court.

Friday,  
June 8.

HANNA, J.—Suit on notes and to foreclose a mortgage.

Answer, that the mortgage had not been recorded within ninety days, and that afterwards the defendant sold said lands to one *Brown* in good faith and for a valuable consideration, who was in possession and was a necessary party, &c.

Demurrer to the answer sustained.

The answer was not sufficient. If it had been sufficient to prevent a foreclosure, it was not a valid defense against a recovery of judgment on the notes, and would, therefore, be bad, having been pleaded in answer to the whole complaint. But it was not an answer to the prayer for a foreclosure. If *Brown* had any rights, distinct from those of the defendant, they would not be concluded by a proceeding to which he was not a party. He was not, therefore, a necessary party; whether a proper party upon his own application, we need not decide.

May Term,  
1860.

O'HERRIN  
v.  
THE STATE.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*S. C. Willson* and *J. E. McDonald*, for the appellant.

### O'HERRIN v. THE STATE.

In crimes other than certain grades of homicide, voluntary drunkenness is no excuse for the criminal act committed while the intoxication lasts, and being its immediate result, such drunkenness being in itself a wrongful act.

Though there be no actual criminal intent, in such case, the law may hold the party, by construction, guilty of such intent.

This Court will not reverse the ruling of the Court below, refusing to grant a new trial moved for on the ground that the verdict is not sustained by the evidence, unless the verdict appears most clearly erroneous.

Verdict as follows: "We, the jury, find the defendant guilty as charged in the indictment, and that he be sentenced to the state prison for a term of two years. *Held*, substantially good.

Friday,  
June 8.

### APPEAL from the *Wabash* Circuit Court.

PERKINS, J.—Indictment for larceny. Conviction, and sentence to the state prison.

Evidence was given upon the trial, tending to show that the appellant was intoxicated when he committed the alleged larceny. His counsel contend that intoxication would, in all otherwise criminal acts, rebut the presumption of criminal intent, and should work the acquittal of the defendant.

But in crimes, other than certain grades of homicide, "it is a settled principle that [voluntary] drunkenness is not an excuse for a criminal act committed while the intoxication lasts, and being its immediate result. 3 Greenl. Ev., § 148. But see 3 Shars. Blacks., p. 26, note. Such drunkenness is, in itself, a wrongful act, for the immediate consequences of which the law will hold the party liable. And although there may be no actual criminal intent, the law may hold the party, by construction, guilty of such intent (1). Lew. U. S. Crim. Law, 405.

The Court below instructed the jury correctly on this branch of the case.

May Term,  
1860.

It is proper to notice here a distinction on this subject, though it is not involved in the case at bar.

O'HERRIN  
v.  
THE STATE.

Where an act is performed by an insane, but not, at the time, an intoxicated, person, which, if committed by a sane person, would be a crime, such act of the insane person is not held to be a crime, though the insanity was remotely produced by previous habits of gross intemperance. 3 Greenl. Ev., § 6.

Again, it is urged that the evidence does not clearly sustain the verdict of guilty returned by the jury; and that the Supreme Court, this being a criminal case, should set the verdict aside for that reason. But, under the code, the rule of practice upon this point, as, indeed, upon most others, if not all, is the same in civil and criminal cases. *Nutter v. The State*, 9 Ind. R. 178.—*Gibson v. The State*, *id.* 264, on p. 267. See *Mullinix v. The State*, 10 *id.* 5. And that rule is the opposite of the one laid down by counsel. This Court will not reverse the ruling of the Court below, refusing to grant a new trial moved for on the ground that the verdict was unsustained by the evidence, unless the verdict appears most clearly erroneous. Ind. Dig., tit. New Trial.—*Roberts v. Nodwift*, 8 Ind. R. 339.

The verdict of the jury was in this form:

“We, the jury, find the defendant guilty as charged in the indictment, and that he be sentenced to the state prison for a term of two years; and that he be fined one dollar; and that he be disfranchised and rendered incapable of holding any office of trust or profit, for a term of two years.”

It is contended that that part of the verdict which directs that the defendant be sentenced to the state prison for a term of two years, does not, with sufficient certainty, fix his punishment. That the language should have been that the defendant be imprisoned at hard labor in the state prison, &c. But the defendant was sentenced to the state prison pursuant to the verdict, in the usual and legal

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1860.

THE INDIAN-  
APOLIS, &C.,  
RAILROAD CO.  
v.  
McMAHAN.

form, and the law determined how he was to be disposed of, on his arrival at the prison. We think the verdict was substantially good.

We see no error in the case, and the judgment in it must be affirmed with costs.

*Per Curiam*.—The judgment is affirmed with costs.

*J. U. Pettit* and *C. Cowgill*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

(1) See *The United States v. Drew*, 5 Mason, 28; *Conwell v. The State*, *id.* 147; *The State v. Bullock*, 5 Ala. R. 413; *The United States v. McGhee*, 1 Curtis C. C. 1; *Burnett v. The State*, Mar. & Yerg. 133; *The State v. John*, 8 Ired. 340; *Schaller v. The State*, 14 Mo. R. 502; *Rex v. Carroll*, 7 C. and P. 145. *Contra*, *Penn v. McFall*, Add. R. 247; *Rex v. Thomas*, 7 C. and P. 817; *Kessy v. The State*, 14 Sm. and Marsh. 518; *Rex v. Menkin*, 7 C. and P. 297; 14 Ohio R. 555.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY  
v. McMAHAN.

Friday,  
June 8.

APPEAL from the *Shelby* Court of Common Pleas.

PERKINS, J.—Suit, commenced before a justice of the peace, by *McMahan* against the *Indianapolis and Cincinnati Railroad Company*, to recover the value of an animal killed upon the track of the road by a locomotive.

There was a demurrer to the complaint before the justice, which was correctly overruled; as the complaint, though defective, perhaps, if tested by the rules of pleading in the higher Courts, was sufficient in a justice's Court.

The plaintiff recovered, and the company appealed to the Common Pleas. In that Court, the entry of record is, "Now come the parties by their attorneys, and by agreement a jury is waived, and this cause being submitted to the summary decision of the Court," &c. The Court

found for the plaintiff. It is now urged that it was error to try the issue of fact till the issue of law, raised by the demurrer, had been disposed of.

May Term,  
1860.

JOHNSON  
v.  
ATWOOD.

It may be doubted whether the parties did not waive that issue, and treat it as out of the case, by the decision of the justice; but if they did not, it has been often decided that a submission of a cause to the decision of the Court, in the form in which it was made in this case, embraced a reference of both the issues of law and fact, and that the finding of the Court involved a decision of both.

And in this case, as we have seen, the issue of law was rightly found.

As to the issue of fact, it was proved that the animal was killed by a locomotive, on the road between *London* and *Shelbyville*, at a point where the road was not fenced, and the value of the animal was shown.

*Per Curiam*.—The judgment is affirmed with 10 per cent. damages and costs.

*J. S. Scobey*, for the appellants.

*L. Barbour, J. D. Howland, E. H. Davis, C. Wright*, and *J. C. Green*, for the appellee.

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JOHNSON and Another v. Atwood and Others.

APPEAL from the *Benton* Court of Common Pleas.

Friday,  
June 8.

*Per Curiam*.—A bill of exceptions in this case states that the defendants moved the Court to dismiss the cause for want of a sufficient bond for costs, and that the Court overruled the motion.

We suppose it was all right, as neither the bond, nor the defect in it, if it had any, is set out in the bill. The dispute between the Court and counsel seems to have been about a matter of fact, and as we have not been furnished with the evidence, we are unable to deny the correctness of the decision, and, of course, it must stand.

May Term,  
1860.

The judgment is affirmed with 5 per cent. damages and costs.

BOWMAN  
v.  
MALLORY.

*J. F. Parker*, for the appellants.

*J. Benedict*, for the appellees.

DAVIS and Others v. ROGERS.

Friday,  
June 8.

APPEAL from the *Warren* Circuit Court.

*Per Curiam*.—Suit on notes drawing 3 per cent. per month interest. Averment that the notes were made in *California*, and that by the law of that state, the rate of interest named was legal. Answer in denial, and as to the interest that it was usurious. Trial by the Court; finding for the amount of the note, and interest at the rate expressed.

It does not appear that any statute of *California*, upon the subject of the rate of interest, was either set out in the pleadings or proved on the trial. *Wilson v. Clark*, 11 Ind. R. 386.

The judgment is reversed with costs. Cause remanded, &c.

*B. F. Gregory* and *J. Harper*, for the appellants.

*J. N. Brown* and *J. Park*, for the appellee.

BOWMAN v. MALLORY.

Friday,  
June 8.

APPEAL from the *Union* Court of Common Pleas.

PERKINS, J.—Suit upon a recognizance of replevin bail. A transcript of the judgment of the justice, which had been replevied, together with the proceedings prior to, and after the judgment, was filed with the complaint.

It appears that the bail was entered *November 9, 1838.* May Term,  
1860.  
Subsequent to the entry of bail appear upon the transcript these entries:

“Execution, the 30th of *April, 1839.*—*J. Yount, J. P.* BLOCK  
V.  
THE STATE.

“*May the 20th.* Execution returned not satisfied for want of buyers.—*John Mc Williams, constable.*”

A demurrer was sustained to the complaint, and final judgment rendered for the defendant, because—

1. The suit should have been by *scire facias*.

The remedy by complaint is substituted by the code; and, as it relates to the remedy alone, it may be pursued. *Wilson v. Clark*, 11 Ind. R. 385.

2. The entries above copied from the transcript show, *prima facie*, a satisfaction of the judgment, by levy, &c.

We think not. They are no evidence of the character of the execution issued; *Stinson v. The State*, 2 Ind. R. 434; and they do not purport that a levy had been made upon property.

3. The statutes of limitations bar.

Were this true, the statutes should have been pleaded. Perk. Pr. 226. In a suit against replevin bail, it may be remarked, it was held, under the old practice, not necessary to show that execution had issued against the principal; nor that judgment against him or his administrator had been revived. *Smith v. Smith*, 8 Blackf. 59. See *Stackwell v. Walker*, 3 Ind. R. 215.

*Per Curiam.*—The judgment is reversed with costs, Cause remanded, &c.

*J. F. Gardner*, for the appellant.

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### BLOCK v. THE STATE.

APPEAL from the *Allen* Court of Common Pleas.

*Saturday,  
June 9.*

HANNA, J.—This was a prosecution for receiving usurious interest upon a loan of money.

May Term,  
1860.

THE STATE  
v.  
PEARCE.

The affidavit states that the defendant "corruptly contracted for and received," &c. The information does not contain an averment to that effect. A motion to quash was overruled. Trial and conviction.

The motion to quash should have been sustained. To constitute the offense of usury, a corrupt or usurious intention is requisite. *Sutton v. Fletcher*, 6 Blackf. 362. Of course the corrupt or usurious intent should be charged in the information, which should be as certain as an indictment. *Mount v. The State*, 7 Ind. R. 654.—*The State v. Miles*, 4 id. 577.

*Per Curiam*.—The judgment is reversed. Cause remanded, &c.

*L. C. Jacoby*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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THE STATE v. PEARCE.

Saturday,  
June 9.

APPEAL from the *Tipton* Circuit Court.

PERKINS, J.—This is an appeal upon a point reserved by the state.

The defendant was tried upon an indictment for larceny. On the return of the verdict against the defendant, it was discovered that the entry of the return of the indictment by the grand jury, at a previous term of the Court, had been omitted; and thereupon the prosecuting attorney moved that the entry be then made *nunc pro tunc*. The defendant admitted the fact that the indictment had been thus regularly returned, but objected to the *nunc pro tunc* entry, and moved on his part for a new trial, on account of the alleged defect in the record.

The Court should have sustained the motion for the *nunc pro tunc* entry. Of its own motion, it should have ordered it on the facts. This Court, of its own motion,



would order a certiorari to bring up such an entry to affirm a judgment. But there was no final judgment in the case when the appeal was taken, and it must be dismissed.

May Term,  
1860.

The appeal is dismissed.

MAYNARD  
v.  
THE STATE.

*D. Nation, J. E. McDonald, and A. L. Roache*, for the state.

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MAYNARD v. THE STATE.

APPEAL from the *Ripley* Circuit Court.

Saturday,  
June 9.

PERKINS, J.—Indictment, containing ten counts, charging the defendant with stealing and receiving stolen goods. Time, place, value, &c., are stated in the second count, by way of reference to the first, in which they are definitely given.

The defendant was convicted on the second, and acquitted on the first count of the indictment.

It is contended there was a misjoinder of counts. This is not so. A person has had goods taken, stolen from him. He finds them in the possession of another person. That person may have stolen them, or knowingly received them from another person who did steal them. Before prosecution, it may be uncertain which. The state, to meet the contingency, charges him, in one paragraph with stealing, in another with receiving the stolen goods. On the trial, the evidence determines the contingency, and the conviction announces the determination. See *Redman v. The State*, 1 Blackf. 429.—*Keefer v. The State*, 4 Ind. R. 246.

It is contended that the statute does not fix a punishment for the offense of receiving stolen goods. It does. It prescribes the same punishment as for the larceny of the goods—that is, if over the value of five dollars' worth is received, the punishment is the same as for grand larceny; if goods of less than that value are received, the punishment is that of petit larceny. 2 R. S. p. 409, § 22.

May Term,  
1860.

WILLIAMS  
v.  
THE EVANS-  
VILLE, &C.,  
RAILRO'D Co.

*Per Curiam.*—The judgment is affirmed with costs.

*J. W. Gordon* and *J. A. Beal*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*,  
for the state.

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WILLIAMS v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

CROSSLAND v. THE SAME.

SLINKARD v. THE SAME.

BLACKMORE v. THE SAME.

LANDER v. THE SAME.

KING v. THE SAME.

ERELEIGH v. THE SAME.

BOGARD v. THE SAME.

SMITH v. THE SAME.

Saturday,  
June 9.

APPEALS from the *Greene* Circuit Court.

*Per Curiam.*—These cases are similar to the case of *O'Donald* against the same appellees (1).

The judgments are affirmed with 3 per cent. damages and costs.

*J. N. Evans*, for the appellants.

(1) *Ante*, 259.

THE STATE *v.* SNYDER.May Term,  
1860.THE STATE  
*v.*  
SNYDER.

In a prosecution for disturbing a religious meeting, the question whether the society is "met together" or dispersed, after the benediction, shall go to the jury, upon proper instructions as to the protection afforded by the statute.

APPEAL from the *Cass* Court of Common Pleas.

*Saturday,*  
*June 9.*

WORDEN, J.—Information against the appellee for disturbing a religious society and its members, when met together for public worship. Trial; verdict and judgment for the defendant.

The information is founded on § 37 of the act defining misdemeanors (2 R. S. p. 437), which provides that "if any person shall disturb any religious society, or any member thereof, when met or meeting together for public worship, \* \* \* such person shall be fined," &c.

On the trial, the state proved that there was a religious society convened at a schoolhouse, for the purpose of religious worship, at which the defendant was present; that religious services were performed. The state then offered to prove that after the benediction had been pronounced, and while the members of the society, or the greater part of them, remained at the door of the house, the defendant disturbed the society and its members by striking one *Abram Zerfis*, the preacher of the society, and talking to him in a rude, boisterous, and insulting manner; but the Court refused to permit the evidence to be given, and decided that no evidence should be given of any of the acts of the defendant after the benediction in the religious services had been pronounced, and the congregation had passed out of the house where the services were had.

To this ruling the state excepted.

We are of opinion that the Court erred in excluding the evidence offered. The statute furnishes its protection to the society and its members, as long as they are "met together," for the purpose indicated. The point of time when they should be considered as being met together, or when they should be considered as having dispersed, we

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LINDLEY.

regard as a question of fact, or, perhaps, a mixed question of law and fact, rather than a pure question of law; and we are not prepared to say, as a matter of law, that the society should not be considered as having been still "met" when the acts alleged were committed. We think the evidence should have gone to the jury, who, under a proper instruction of the Court as to the extent of the protection afforded by the statute, should have determined, as a question of fact, whether the society were still met, or whether they should be considered as having dispersed.

*Per Curiam.*—The appeal is sustained at the costs of the appellee.

*J. Guthrie*, for the state.

*J. R. Flynn*, for the appellee.

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THE STATE v. LINDLEY.

Keeping a gaming house may be a continuous act; and all the time which a house is thus kept prior to the prosecution, constitutes but one indivisible offense, punishable by a single prosecution.

But an information will not be quashed for the reason that the defendant had been previously tried upon an information charging the keeping of the same house for the same period of time.

The Court, in such case, should proceed with the trial, until the evidence determines whether there was but one offense or two.

Saturday,  
June 9.

APPEAL from the *Martin* Court of Common Pleas.

PERKINS, J.—Prosecution for keeping a gaming house. The charge in the affidavit and information was that "on the 27th of *July*, 1848, and on divers other days and times before said day, *Jacob B. Lindley* did unlawfully erect, continue, and maintain a common gaming house, at," &c.

The defendant was arraigned, pleaded not guilty, and a jury was impaneled to try the issue.

At this point, the defendant moved to quash the information, and alleged the following facts, as the ground of

his motion, viz., that the defendant had already been tried on an information filed on the same day as that pending, for keeping and maintaining the same house as a gaming house, on and from the 28th day of *July*, 1858, to the 27th day of *November*, 1858, which fact the district prosecuting attorney admitted to be true. •

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The Court sustained the motion to quash.

Keeping a gaming house may be a continuous act, and all the time during which a given house is continuously thus kept prior and up to the prosecution for the keeping, constitutes one indivisible offense, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed. See 1 Chit. Cr. Law, 218; and 1 Wat. Archb., pp. 84, 111.

Were it certain, therefore, in this case, that the keeping of the gaming house, as charged in the two informations, constituted but one continuous keeping, the first trial would have barred the second; and though a motion to quash would have been an irregular mode of taking advantage of the bar, as, properly, it should have been given in evidence on a trial; still, if a correct result had been reached, though by an unprofessional mode, the judgment would not be reversed.

But is it certain that the periods covered by the two informations constitute one continuous period? On the face of the informations, they appear to. But, it must be recollected that in prosecutions for criminal offenses of this character, time laid in the information is not material, and need not be proved as laid. Ind. Dig. 364.—Chit. and Archb., *supra*.

Suppose the facts should turn out to be, that the defendant kept the house named as a gaming house, during the month of *May*, 1858, and then sold it, surrendering the possession to the buyer, who did not keep it for gaming. The keeping it thus, by the defendant, for the month of *May*, would constitute one offense.

Suppose, again, that on the 27th of *July* he purchased or received back the house from the person to whom he

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THE STATE.

had sold it, and recommenced the use of it as a gaming house. Here he would be guilty of another, a separate offense, for which another, a separate information would lie. For aught that appears in the record, such may have been the facts on which the two informations were based.

Hence, the Court should not have quashed the information, but proceeded with the trial, letting the evidence determine the question whether there was but one, or whether there were two offenses to be punished.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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PEARSOLL v. THE STATE.

Saturday,  
June 9.

APPEAL from the *Washington* Court of Common Pleas.

HANNA, J.—In this case, the whole record consists of but a certified order of the Common Pleas Court overruling a motion made by the appellant. That entry states that the defendant represented by her petition that she was indicted for grand larceny by the grand jury, and was then in jail, and that she voluntarily, in writing, submitted to the jurisdiction of the Court, and moved to be tried upon said charge, which motion was overruled, and defendant excepted.

Neither the indictment nor the written offer of submission are in the record.

There was nothing, so far as this record shows, before the Court to enable it to act understandingly in granting such motion; and, therefore, the ruling was correct.

*Per Curiam.*—The judgment is affirmed with costs.

*C. L. Dunham* and *H. Heffren*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

Dodd, Auditor of State, *v.* MILLER.

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THE SAME *v.* RAFFERT.

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Dodd  
*v.*  
MILLER.

THE SAME *v.* KIELMAN.—Three Cases.

THE SAME *v.* MAGUIRE.

THE SAME *v.* ROSENBERG.

THE SAME *v.* SHERER.

Claims for work done on contracts for draining swamp lands, are payable out of the swamp land fund alone.

If there is no money in the treasury belonging to that fund, the auditor of state cannot issue his warrant for such a claim.

No money in the fund, is a good answer to an alternative writ of mandate to compel the auditor to issue a warrant for the payment of a claim.

The act of 1859, providing that the auditor shall not draw a warrant upon the treasurer unless there be money in the treasury belonging to the fund upon which the same is drawn, &c., does not take away any vested right of claimants for work done under the swamp land act.

THE judgments in all these cases were reversed for the reasons given in *Dodd v. Miller*, in the following opinion: *Saturday, June 9.*

Appeal from the *Marion* Court of Common Pleas.

WORDEN, J.—*Miller*, holding certain certificates for work done on contracts for draining swamp lands, issued by the commissioner of swamp lands of *Lake* county, applied, on the 18th of *August*, 1859, to the auditor of state, at his office, &c., and requested him to issue his warrant or order on the treasurer of state for the payment of the amount due upon the certificate, out of said swamp land fund. The auditor refused to draw his warrants upon the treasurer for the amount, and *Miller* instituted proceedings, by way of writ of mandate, to compel the issuing of such warrants.

The defendant answered as follows:

“That at the time the said account was so presented to him as auditor of said state of *Indiana*, and from thence,

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v.  
MILLER.

there was, and still is, no money in the treasury of the state of *Indiana*, belonging to the fund upon which the warrant for said account is to be drawn, to pay said account, or any part thereof; nor is there any appropriation made by law, upon money actually in the treasury of said state, subject to the payment of said claim, for the payment thereof; wherefore," &c.

To this answer a demurrer was sustained, and the defendant excepted.

There was final judgment for the plaintiff, and the defendant appeals.

The only question presented is, as to the correctness of the ruling below on the demurrer to the answer.

Two positions seem to be maintained by counsel for the appellee, in support of the ruling below: First, that the answer is defective in not showing affirmatively how the fund applicable to the payment of the claim has been exhausted, or the reason why it is not in the treasury; and, second, that the plaintiff was entitled to the warrant, whether the money applicable to the payment thereof was in the treasury or not.

Moneys arising from the sale of swamp lands, are to be deposited by the county treasurers with the treasurer of state, as often as once in every ninety days, or oftener if the auditor deems the interest of the state requires it. 1 R. S. p. 473, § 16. No work shall be let, or advertised to be let, unless there shall have been swamp lands sold previously thereto, within the county, of sufficient amount to pay the cost of the work advertised to be let. *Id.*, § 25. Perhaps, under these provisions, the presumption would be that sufficient money was in the state treasury to pay for any work in ditching the lands, that might be done: but still this would only be a presumption based upon the supposition that the law had been complied with, in not letting work until sufficient lands had been sold to pay for it, and in the payment of the money arising from the sales, by the county treasurers into the state treasury. This presumption might not be true in point of fact. Such claims are only payable out of the swamp land fund; and the



auditor alleges that there was no money in the treasury applicable to the payment of the claim. This fact was admitted by demurrer, the answer, as we think, being well pleaded. If the presumption above noticed would arise, it would be available as a matter of evidence on an issue of fact as to whether there were funds in the treasury applicable to the payment of the claim. But the presumption is not conclusive, nor such an one as will not admit of averment to the contrary. If there was no money in the treasury for the payment of the claim, we do not think the auditor was required, by any rule of pleading, to go farther in his answer, and show why that state of things existed.

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MILLER.

We have no difficulty upon the other branch of the case, being satisfied that if there were no moneys in the treasury belonging to the fund upon which the warrant, if issued, was to be drawn, the auditor was not required nor authorized to draw the warrant demanded. It is expressly enacted that "the auditor of state shall at no time draw a warrant upon the treasurer of state, unless there be money in the treasury, belonging to the fund upon which the same is drawn, to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same," &c. Acts of 1859, p. 230, § 8.

It is claimed that this enactment is inoperative and void, so far as it affects the certificates in question, they having been issued before the passage of the statute. This statute does not, as we think, take away any vested right which the appellee had before its passage. He had a right to receive his money out of the appropriate fund whenever it should be in the treasury, and this right is not in any manner impaired by the act in question. Admitting that under § 35 of the swamp land act, the auditor might have been required to issue the warrant, although there was no money in the treasury belonging to the appropriate fund to redeem it, still the holder of the warrant could obtain his money no sooner than it came into the treasury. The right to the money is unimpaired, and no delay in the

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v.  
MILLS.

payment is created. The case is analogous to those where statutes affecting the remedy, but not impairing the right, have been upheld. Ind. Dig., p. 270, § 50.—*Hancock v. Ritchie*, 11 Ind. R. 48.

We think the answer in question was good, and the demurrer incorrectly sustained.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. E. McDonald*, Attorney General, for the appellant.

*S. Major*, for the appellees.

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JONES v. MILLS.

Monday,  
June 11.

APPEAL from the *Warren* Circuit Court.

HANNA, J.—*Mills* applied for a mandate against *Jones*, auditor of *Warren* county, to compel him to audit his account, and issue a warrant on the treasurer for an amount claimed by him to be due from the county of *Warren*, for a balance on his salary as judge of the Court of Common Pleas. He had served for four years, and received 500 dollars a year. He now claims he was entitled to 800 dollars a year.

The defendant answered, first, in denial; second, admitting the service, &c., as judge, and that the payment had been at the rate of 500 dollars per annum, but averring that the plaintiff received that sum believing it was all he was entitled to, and in satisfaction of his annual salary, &c.

The plaintiff replied in denial of the second paragraph.

Trial by the Court; judgment for the plaintiff.

The appellant insists that the evidence does not sustain the finding and judgment; and that as but one witness was introduced, there is no conflict of testimony to reconcile, and that we should, therefore, examine it and decide without reference to the finding of the Court below.

The appellant was the only witness, and from his testimony it appears that *Mills* made out his account and drew his warrants, upon the basis of a salary of 500 dollars per annum; and no more was by him demanded during his term of service, nor did the witness believe that he thought himself entitled to any greater sum. This falls far short of showing that the various sums received were so received in full satisfaction of all demands, &c.; and it is not necessary, therefore, for us to determine whether we would disturb the finding if the evidence only tended to sustain it.

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SPICELY  
v.  
TRUE.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*J. H. Brown* and *J. Park*, for the appellant.

*R. A. Chandler*, for the appellee.

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SPICELY v. TRUE.

APPEAL from the *Orange* Court of Common Pleas.

Monday,  
June 11.

*Per Curiam.*—It appears that *True* and *Spicely* were engaged together in buying and shipping wheat for others. *True* settled with those for whom the purchases were made, and, for a certain part of the wheat, was compelled to deduct a specific sum per bushel from the usual price, because the same was damaged. *True* then sued *Spicely* for money had and received, money laid out and expended—the principal items of the claim being the one-half the loss on the damaged wheat, and the one-half the commission for buying, &c.

There was no evidence of the amount paid for the damaged wheat, nor of the amount obtained therefor. Nor was there any evidence of the state of the account between the partners, nor of any demand for a settlement or payment of any balance claimed to be due, if such demand was necessary.

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STUMP  
v.  
HART.

A new trial should have been granted.  
The judgment is reversed with costs. Cause remanded,  
&c.  
*J. Baker*, for the appellant.

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STUMP v. HART and Others.

STUMP v. TOMS and Another.

Monday,  
June 11.

APPEAL from the *Fountain* Circuit Court.

*Per Curiam*.—Action to recover possession of certain real estate. Defense relied upon, estoppel.

The record does not purport to contain all the evidence. It does not allege that the evidence in the record was all the evidence given in the cause. Hence, instructions refused, must be presumed to have been refused as impertinent; and those given, if right under any state of facts that might have been proved, must be presumed to have been given upon such a state of facts. Those given in this case asserted correct rules of law, as applicable to a possible state of facts. The judgment, therefore, must be affirmed with costs.

It may be remarked that we have looked into the evidence that is incorporated in the transcript, and have no doubt that if it actually was all the evidence given, it proves a clear case of estoppel, within the rule in the cases cited in Ind. Dig., p. 420; and *Gatling v. Rodman*, 6 Ind. R. 289.

The judgment is affirmed with costs.

*J. R. M. Bryant* and *R. A. Chandler*, for the appellant.

*M. M. Milford*, for the appellees.

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## HARRIS v. HARLAN.

HARRIS  
v.  
HARLAN.

By taking a mortgage to secure unpaid purchase-money, the vendor of real estate waives the implied equitable lien which he might otherwise have had for the payment thereof, and creates an express lien.

As to the question of priority between the holders of notes for installments of purchase-money secured by mortgage, *Hough v. Osborne*, 7 Ind. R. 140, is followed.

The holder of the junior of two such notes need not be made a party to an action by the holder of the senior note to foreclose, notwithstanding the statute requiring that all persons having an interest in the subject of the action shall be made parties.

14	439
129	438
14	439
137	329

APPEAL from the *Grant* Circuit Court.Monday,  
June 11.

HANNA, J.—*Harris*, as assignee, sued *Harlan*, as assignor, of a promissory note, averring that at the time the note became due, the maker thereof was insolvent, &c.

*Harlan* answered, first, in denial; second, that the note, which was for 100 dollars, was, together with a mortgage to secure the payment thereof, given for a part of the purchase-money of certain real estate; that the same was of the value of 300 dollars, and was so mortgaged.

The plaintiff replied, admitting that the note and mortgage were so executed, but averring that there was another note for a part of the purchase-money, for 125 dollars, that was also included in said mortgage security, and that suit had been brought upon said note and to foreclose said mortgage, and that such proceedings were had as resulted in a judgment for the amount of that note (the same being due one year before the one now in controversy), and a foreclosure and sale of the mortgaged premises; and that, therefore, the security was exhausted.

There was a demurrer sustained to this reply, which presents the principal question in the case.

It is not shown that the holder of the note upon the assignment of which suit is now brought, nor the defendant in this case, had notice of the proceedings to foreclose. It is insisted that they should have been made parties to that suit. And it is further suggested that as both notes were given for parts of the purchase-money, the fact that

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v.  
HARLAN.

one was made payable at an earlier day than the other, did not give the holder of that note a prior and exclusive lien as against the holder of the note for the deferred payment.

By taking a mortgage to secure the unpaid purchase-money, the vendor waived the implied equitable lien which he otherwise might have had for the payment thereof, and created an express lien. Although the implied and express liens are both intended to effect the same purpose, and both on the same property, yet they are, in their nature, so different, that they cannot both exist as to the same object, at the same time, and for the same purpose, because they are inconsistent. One is a mere equity, based upon the idea that the vendee holds the legal estate in trust for the payment of the vendor. The other puts the legal title in the vendor, and makes him the trustee—destroys, or at least merges, the implied lien, by creating the express lien, and throwing the trust on the vendor, the mortgagee.

We suppose, then, that the mortgage, so far as any question is raised as to priority, in the case at bar, would be governed by the rules applicable to ordinary mortgages executed to secure money payable by installments. That question has been settled by this Court. *Hough v. Osborne*, 7 Ind. R. 142.

The next question is, whether the payee or holder of the note last due, was a necessary party to the proceedings to obtain judgment upon, and foreclose as to the first note. It is laid down in the case above cited, that “the rule is, that notes due at different times are like so many successive mortgages.” If this is so, we cannot perceive the necessity for making the holder of the later note—the junior mortgage—a party to the proceedings upon the one that matured first, notwithstanding the statute which requires that all persons having an interest in the subject of the action should be made parties. The subject of the action, it is true, in one sense, is the foreclosure of the mortgage; but it is not the foreclosure of the whole mortgage, necessarily, but, if we may use the expression, the

senior portion of it—that part intended and operating as a security for the payment of the note first maturing.

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The plaintiff's action was founded upon the assignment of the note, and not upon the proceedings had to foreclose as to the first note, and, therefore, it was not necessary to file a transcript of said proceedings with the reply; nor do we decide whether they are conclusive or not, as proof of the facts set up in said reply.

REASOR  
v.  
RANEY.

The demurrer should have been overruled.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*A. Steele* and *H. D. Thompson*, for the appellant.

*H. S. Kelly*, for the appellee.

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REASOR and Another v. RANEY.

APPEAL from the *Floyd* Circuit Court.

Monday,  
June 11.

*Per Curiam.*—This was a suit by *Raney* upon a judgment by him theretofore recovered against *Reasor*, in the same Court.

A demurrer to the complaint was overruled, and upon this ruling the only question in the case arises.

The record of the former judgment, which is the foundation of the action, is not made a part of the complaint.

If the suit had been upon the judgment of another Court, without doubt a transcript of the record, which was the foundation of the suit, should have been filed with the complaint.

Does the fact that the suit was upon a record and judgment of the same Court, dispense with that necessity?

In the case of *Votaw v. The State*, 12 Ind. R. 497, this Court held that a recognizance fell within the statutory provision which requires that where a written instrument is the foundation of an action, either the original or a copy thereof shall be filed with the complaint. We see no

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v.  
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reason why a record of a judgment should not also be included within the same rule. Certainly, a Court ought not to be required to search its records to ascertain, in the first instance, whether such a record exists in a form that would make it the foundation of an action.

The demurrer should have been sustained.

The judgment is reversed with costs. Cause remanded, &c.

*T. L. Smith* and *M. C. Kerr*, for the appellants.

*W. T. Otto* and *J. S. Davis*, for the appellee.

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SMITH and Others v. DOGGETT and Others.—Two Cases.

SMITH v. ROWE and Others.—Two Cases.

SMITH and Others v. SAVAGE and Others.

SMITH v. SATTERLEE and Others.

The statute authorizing the practice of entering and enforcing the collection of judgments without valuation or appraisement, is not unconstitutional.

Monday,  
June 11.

APPEAL from the *Lake* Court of Common Pleas.

WORDEN, J.—Action by the appellees against the appellant upon promissory notes waiving the benefit of valuation and appraisement laws. Judgment was rendered for the plaintiffs in accordance with the terms of the notes, and the only question raised in the case is in reference to the constitutionality of the statutes authorizing the rendition of judgments to be collected without appraisement, upon promissory notes waiving such appraisement.

The 15th section of the act concerning promissory notes and bills of exchange (1 R. S. p. 379), provides that “upon any instrument of writing, made within this state or elsewhere, containing a promise to pay money without relief



from valuation laws, judgment shall be rendered, and execution had, accordingly." This section, so far as it relates to instruments other than bills of exchange and promissory notes, may be void, such other instruments not being embraced in the title of the act. *Mewherter v. Price*, 11 Ind. R. 199. But this objection does not exist here, as the suit was instituted upon promissory notes. By § 381 of the code, it is provided that "when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment."

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SMITH  
v.  
DOGGETT.

It is submitted by counsel for the appellant that the law authorizing the practice of entering and enforcing the collection of judgments without valuation or appraisement laws, is unconstitutional and void—

1. Because it is a conditional law, of no force and effect without the consent of the party affected thereby.

2. Because it is a special law regulating the practice of Courts of justice in particular cases.

3. Because it is a special law, made in a case where a general law of uniform operation throughout the state can be easily made."

The force of the first objection thus made is not perceived. There is no condition whatever attached to the taking effect of the law. The law is in force as to all persons, although a particular individual may never execute a note waiving appraisement laws. To be sure, if he never execute such a note, the law can never affect him. So if he never contract a debt, the laws for the collection of debts can never affect him. The taking effect of the law does not depend upon the volition of a party to a note, in any sense whatever; but whether he will execute a note within the terms of the law, depends upon his consent. If he execute such note, the law, already in force, operates upon it, and requires judgment to be rendered in accordance with its terms.

The second and third objections may be considered together. By the 22d and 23d sections of art. 4 of the constitution, it is provided that no local or special laws shall be passed regulating the practice in Courts of justice; and

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VESEY  
v.  
REYNOLDS.

that where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state.

The laws in question seem to be neither local nor special, but, on the contrary, they are general, and of uniform operation. They operate throughout the state upon the class of contracts provided for. They do not operate upon all contracts, neither is it necessary that they should, in order to be general and of uniform operation. As well might it be urged that a law punishing felonious homicide by hanging, would be invalid because it required a different judgment from that inflicted for other crimes. We perceive no error in the case.

*Per Curiam.*—The judgment is affirmed with costs.

*A. McDonald*, for the appellants.

*J. Bradley* and *D. J. Woodward*, for the appellees.

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VESEY and Another v. REYNOLDS

Monday,  
June 11.

APPEAL from the *St. Joseph* Court of Common Pleas.

WORDEN, J.—This was an action brought by the appellee against the appellants, to recover the amount due upon a promissory note made by the defendants to the plaintiff, and also the interest on three other notes not then due, the interest on which was payable annually. Trial by the Court; finding and judgment for the plaintiff.

A demurrer was overruled to the complaint, and exception taken. But no error, in this respect, is pointed out in the brief of counsel, and we perceive none.

It is assigned for error that the judgment is for 28 dollars, 65 cents, too much. An excess in the amount recovered is assigned in other forms. The computation made by the counsel for the appellant shows that the judgment was for too much, while that made by counsel for the appellee shows that it was not enough. We have not made

an exact calculation of the amount that was due upon the several notes as shown by the indorsements therein, for the reason that the matter was not brought to the attention of the Court below, on the motion for a new trial. A new trial was asked because the evidence did not sustain the finding, but not on the ground that the damages assessed were excessive. That this was necessary, is determined in the case of *Spurrier v. Briggs*, at the present term.

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FOSTER  
v.  
BIRCH.

The Court rendered judgment to be collected without relief from valuation and appraisement laws. It is claimed that this was erroneous, because the notes did not authorize it, the language therein being "waiving appraisement laws" merely. This, we think, was substantially a promise to pay the money "without relief from valuation laws."

We find no error in the record sufficient to reverse the judgment.

*Per Curiam*.—The judgment is affirmed with 3 per cent. damages and costs.

*J. A. Liston* and *R. L. Farnsworth*, for the appellants.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellee.

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FOSTER v. BIRCH and Others.

The failure of an administrator to file a second bond, upon obtaining an order for the sale of real estate, he and the Court supposing, though erroneously, that the statute had been complied with, will not render void a sale regularly made and confirmed, if the money received is faithfully accounted for.

14	445
134	427
14	445
147	253

APPEAL from the *Howard* Circuit Court.

Monday,  
June 11.

PERKINS, J.—*Jones* was the administrator upon the estate of *Ethan Birch*, deceased; and, to secure to the heirs of *Birch* the legal title to a piece of land in which *Birch* had an equity, he borrowed 200 dollars, paid the debt due upon the land, and had the title conveyed to the heirs. No personal estate of *Birch* came to the hands of *Jones*,

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v.  
BIRCH.

his administrator, by means of which the 200 dollars borrowed could be repaid. It became necessary, therefore, to sell a part of the real estate, the title to which had been procured by the 200 dollars borrowed, as *Birch* left no other. But the title to that was in the heirs of *Birch*, and they were infants. *Jones* was, upon these considerations, appointed guardian of the heirs; and, at the same term of the Court, obtained an order for the sale of the lands necessary to pay the 200 dollars.

The object of his appointment was to effect such sale; but he filed his only bond in the penalty of 1,000 dollars—large enough—on his appointment, no other being filed on the making of the order by the Court for the sale of the land.

The administrator and the Court both regarded the bond filed, as being filed to fulfill the requirement of the statute relating to the order of sale of the land.

The lands were appraised, and sold for a fair consideration, the sale confirmed by the Court, the purchase-money received by the administrator, and appropriated to the payment of the debt, as ordered. All seems to have been done *bona fide*.

The heirs now sue to recover back that land, without first offering to return the purchase-money and interest, now, by lapse of time, amounting to between 400 and 500 dollars. They recovered below, on the ground, plainly, as there is no other disclosed justifying such recovery, that a second bond was not filed by the administrator upon the order of sale.

The informality of the proceedings precedent to the sale, except as to the bond, would not vitiate. *Adkins v. Sidener*, 5 Ind. R. 228.—Ind. Dig., 496. To have complied with the statute, a second bond should have been filed. *Warwick v. The State*, 5 Ind. R. 350.—Ind. Dig., 496.

But the question here is, will the failure to file such bond, where the administrator and Court really supposed, though mistakenly, that the statute had been complied with, and the sale was regularly made, and afterwards

confirmed by the Court, and the money received faithfully accounted for, render the sale void? And we think not. Everything has been accomplished that a bond could have accomplished. The heirs have no equity. They have received the full benefit of the sale. A bond is only required to secure the heirs against the misappropriation of the sale money. Here, they have had all the benefit of that. We think the sale, under the exact circumstances of this case, should not be held void.

May Term,  
1860.

LITTLE  
V.  
WALLER.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*N. R. Lindsay* and ——— *Harrison*, for the appellant.

*C. D. Murray* and *J. W. Thompson*, for the appellees.

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LITTLE and Another *v.* WALLER.

APPEAL from the *Shelby* Circuit Court.

Monday,  
June 11.

*Per Curiam*.—In this case, the record shows a trial, finding and judgment by the Court; and an objection and exception to such finding and judgment, but does not show directly that any motion for a new trial was made, or reasons therefor filed.

The assignment of errors is general. The argument of the appellant is directed to the point, whether the finding is sustained by the evidence. The appellee insists that this question cannot arise in this Court upon the record presented. We are also of that opinion.

The judgment is affirmed with costs.

*S. Major*, for the appellants.

*D. M' Donald* and *A. G. Porter*, for the appellee.

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1860.

WILKERSON and Another *v.* CHADD.

NELSON  
*v.*  
HART.

Monday,  
June 11.

APPEAL from the *Putnam* Circuit Court.

*Per Curiam*.—Suit on note. Answer, averring that the note was given for lands for which an imperfect deed was executed, which is referred to and made a part of the answer, and that the vendor had no title to a part, &c., of said land, &c. Demurrer sustained to the answer. Judgment for plaintiff.

The deed exhibited does not sustain the averments in the answer. The demurrer was properly sustained. *Small v. Reeves*, at this term (1).

The judgment is affirmed with 5 per cent. damages and costs.

*J. P. Usher*, for the appellants.

*D. E. Williamson*, for the appellee.

(1) *Ante*, 163.

NELSON *v.* HART, Administrator.

Monday,  
June 11.

APPEAL from the *Putnam* Court of Common Pleas.

*Per Curiam*.—Suit by the appellant against the appellee. Trial by the Court; finding and judgment for the defendant.

The errors assigned are upon the admission of the testimony of a witness claimed to be incompetent to testify, and the admission of a deposition in evidence which had been suppressed.

There was no motion for a new trial; hence, no question is presented for our consideration. *Kent v. Lawson*, 12 Ind. R. 675.

The judgment is affirmed with costs.

*J. A. Matson* and *D. E. Williamson*, for the appellant.

DARLINGTON *v.* WARNER.May Term,  
1860.DARLINGTON  
*v.*  
WARNER.

An *amicus curiæ* cannot take a valid exception.

A judgment by default will not be reversed, unless the party defaulted take proper steps in the Court below to relieve himself from the judgment.

APPEAL from the *Laporte* Court of Common Pleas. *Monday, June 11.*

WORDEN, J.—Action by *Warner* against *Darlington* on a note. An answer of several paragraphs was filed, and replication.

On the second day of the *June* term of the Court, 1858, the plaintiff not appearing on being called, the action was dismissed on the defendant's motion, for the want of prosecution, and judgment for costs rendered against him. On the seventh day of the same term, the plaintiff appeared and moved, on affidavit filed, to set aside the default and judgment against him, which motion was granted. The cause was continued, and at the next term, on motion of the plaintiff, the entry made at the previous term was amended so as to show that the attorneys for the plaintiff were in Court at the time of making the motion, and as friends of the Court, opposed the motion, but did not appear for the defendant. To this action of the Court, exception was taken by the attorneys as friends of the Court. The defendant not appearing, the issues joined were tried by the Court, and there was a finding and judgment for the plaintiff.

The setting aside of the original default against the plaintiff, the amendment of the record, and the default and judgment against the defendant, are assigned for error.

We are of opinion that no question is presented by the record for our decision. No exception was taken by the parties to any ruling of the Court. A friend of the Court cannot, in that capacity, take a valid exception to its rulings. *Campbell v. Swasey*, 12 Ind. R. 70. There was no motion either for a new trial, or to set aside any of the proceedings of the Court below subsequent to the original default against the plaintiff.

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1860.

SINCLAIR  
v.  
ROUSH.

It is insisted that after the default and judgment against the plaintiff, the defendant was out of Court, and that no motion could be made even at that term, to set aside the default and judgment, without notice to him. This point is not properly before us, as, if the subsequent proceedings were without authority for the want of notice to the defendant, he should have taken steps in the Court below to set them aside; and if an application of that kind should be improperly overruled, exception could be taken which would present the question for decision here. It has been held, in numerous instances, that a judgment by default will not be reversed in this Court, unless the party has taken steps in the Court below to relieve himself from the judgment. This case cannot be distinguished from them. *Vide* 13 Ind. R. 430, 453.

*Per Curiam*.—The appeal is dismissed with costs.

*J. Bradley* and *D. J. Woodward*, for the appellant.

*J. B. Niles*, for the appellee.

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SINCLAIR v. ROUSH.

Where the ground of objection to testimony is not stated, the presumption, on appeal, is in favor of the ruling of the Court.

In an action for damages, the opinion of a witness as to the amount of damages sustained by the plaintiff, is inadmissible.

*Aliter*, as to experts, and persons acquainted with the value of particular property.

The affidavit of a juror is not competent to impeach the verdict.

In actions for damages within § 398, 2 R. S. p. 127, where the recovery is less than five dollars, each party pays the costs made by himself, and cannot recover back the amount from the other, except that the plaintiff may recover an amount of his costs equal to the amount of damages recovered.

Monday,  
June 11.

APPEAL from the *Grant* Circuit Court.

WORDEN, J.—Action by the appellant against the appellee for a nuisance in the erection of a dam, whereby water was caused to overflow the lands of the plaintiff. Trial by



a jury; verdict for the plaintiff for one cent damages, and judgment, over plaintiff's motion for a new trial.

May Term,  
1860.

The evidence is not set out. It appears by a bill of exceptions, that "during the progress of the trial, the plaintiff asked a witness on the stand to testify as to the amount of damages the plaintiff had sustained by the overflowing of his land." The defendant objected to the question, and the objection was sustained, and to this ruling the plaintiff excepted.

SINCLAIR  
v.  
ROUSH.

We cannot say that there was any error in this ruling. The ground of the objection to the testimony is not stated, and the presumptions are in favor of the ruling of the Court. For aught that appears, the testimony may have been sought to be elicited under circumstances that would render it inadmissible, as, for instance, upon a cross-examination of the witness, and the testimony not being connected with the matters testified by the witness in his examination in chief. But there seems to be a substantial objection to the testimony, offered at any time, and under any circumstances. We understand the testimony offered to have been the opinion of the witness as to the extent of the plaintiff's damages. He could not testify "as to the amount of damages," otherwise than by expressing his opinion on that subject. He was not asked to state the circumstances, and describe the injury complained of, whereby the jury might form their own estimate as to the amount of damages. Opinions, in such cases, are inadmissible, but the witnesses may describe the injuries, and from the facts proven the jury are to form their own conclusions as to the amount of damages. The case differs from those where persons of skill or science may express an opinion, and also from those where a person acquainted with the value of particular property, may give an opinion in reference to such value. This view is fully sustained by the case of *The Evansville, &c., Railroad Co. v. Fitzpatrick*, 10 Ind. R. 120.

One of the grounds for a new trial is, that the Court charged the jury that one cent damages was sufficient to carry costs. An affidavit of a juror was offered for the

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ROUSH.

purpose of showing that they intended that their verdict should carry costs, and supposed that it would, and had they not so understood the matter, they would have rendered a verdict sufficient to carry the costs. The bill of exceptions shows that the motion for a new trial was overruled, "for the reason, amongst others, that the jury had nothing to do with the question of costs, and that they had no right to regard anything said by the Court on that subject." It does not appear, except by implication, that the alleged instruction in reference to costs, was given. No such instruction, nor, indeed, any other, is contained in the record, nor does it appear that, if given, it was excepted to. Hence, we need express no opinion as to the effect of such instruction. The proffered affidavit of the juror was clearly incompetent to impeach the verdict. *Drummond v. Leslie*, 5 Blackf. 453. There was no error committed in overruling the motion for a new trial.

On motion of the defendant, the Court entered judgment in his favor against the plaintiff for all the costs in the case, except one cent. To this ruling the plaintiff excepted. By § 396 of the code, the party recovering judgment in a civil case, is entitled to costs, except in those cases in which a different provision is made by law. Section 398 provides that "in all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character, and false imprisonment, and where the title to real estate comes in question."

It appears by the bill of exceptions, that the title to real estate did not come in question on the trial, the plaintiff's title being admitted, hence, the plaintiff was not entitled to full costs under the last exception of the above statute. *Dodd v. Sheeks*, 5 Blackf. 592.

But the provision above quoted does not authorize the rendition of judgment for the defendant against the plaintiff for costs, where the plaintiff recovers, although the recovery be less than five dollars. It simply limits the amount of the plaintiff's costs to be recovered from the

defendant, to an amount equal to the sum recovered, where it is less than five dollars, but does not make the plaintiff liable for any of the defendant's costs. In cases within the above section, where the recovery is less than five dollars, each party pays the costs made by him, and cannot recover it back from the other, except the recovery by the plaintiff of an amount of his costs equal to the sum recovered. In this case, neither party is entitled to judgment against the other for costs (except for the one cent), and the judgment for costs in favor of the defendant is erroneous, and must be reversed.

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1860.

STETSON  
v.  
CLEASEY.

*Per Curiam.*—The judgment in favor of the defendant against the plaintiff below for costs is reversed, with costs here, and the cause remanded.

*J. Brownlee*, for the appellant.

*H. D. Thompson*, for the appellee.

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STETSON and Others v. CLEASEY and Another.

Attachment against a foreign corporation. Debtors of the corporation, residing in this state, being garnished, they appeared and answered, admitting the indebtedness, without in all cases specifying the nature of the evidence of the indebtedness, and in no case claiming exemption from judgment on the ground that such evidence was paper governed by the law merchant. Judgments were rendered against them. Subsequently, the corporation made an assignment, and the assignees appeared in the attachment suit, and answered, setting up the assignment, and claiming that the evidences of indebtedness against the garnishees had passed to them, so as to make the garnishees debtors to the assignees; but they did not show that those evidences were negotiable paper. *Held*, that their answer was bad, and that the judgments were right.

APPEAL from the *Marion* Circuit Court.

Monday,  
June 11.

PERKINS, J.—*Cleasey* and son, of *Ohio*, procured a writ of attachment, from the *Marion* Circuit Court, *Indiana*, against the *Ohio Life and Trust Company*, a foreign corporation, and garnished several debtors of the trust company, who were residents of this state.

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1860.

STETSON  
v.  
CLEASEY.

Those debtors appeared and answered to the writs, admitting indebtedness, but not, in all cases, specifying in what the evidence of the indebtedness consisted, and in no case claiming exemption from judgment on account of such evidence of indebtedness being paper governed by the rules of the law merchant. Judgments were rendered against them.

About a month subsequent to the attachment, the *Ohio Life and Trust Company* made an assignment of all their property to *Stetson* and others, in trust for the benefit of creditors. These assignees appeared in this suit, and were permitted to answer, setting up this assignment, and claiming that the evidences of indebtedness against the garnishees in the suit had passed to them, so that said garnishees were no longer the debtors of the trust company, but were then the debtors of the assignees. They did not show that the indebtedness was evidenced by negotiable paper. Their defense was held insufficient.

If the assignment in question had been made before the service of process of garnishment, it would have transferred the choses in action against debtors in this state; though it may be that the Courts of this state might, in favor of creditors in this state, have sustained garnishments laid after the assignment was executed. See 2 Kent (6th ed.), p. 401. And if it had been shown that the indebtedness was evidenced by paper governed by the law merchant, or which had been assigned prior to the attachment, it seems that the garnishees would not have been made liable in this suit. *The Junction, &c., Railroad Co. v. Cleneay*, 13 Ind. R. 161.—Drake on Attach., (2d ed.) 622, *et seq.*—Burr. on Assign., (2d ed.) p. 362, *et seq.*

But as none of the grounds of defense above mentioned was set up, and the indebtedness was admitted, we think the judgment below was right. The code provides (2 R. S. p. 68, § 176), that from the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action, for the amount of money, property, or credits in his hands, or due and owing from him to the defendant.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs. May Term,  
1860.

*J. L. Ketcham, I. Coffin, and A. Todd*, for the appellants. FRENCH  
v.  
HOWARD.  
*J. Morrison, C. A. Ray, and W. Henderson*, for the appellees.

## FRENCH and Another v. HOWARD.

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Where a suit had been brought on the first of two notes for installments of the purchase-money of real estate, and judgment rendered for the plaintiff on issues made upon certain defenses, it was *held*, on demurrer, in a suit upon the second note, that the defendant was estopped to plead the same defenses.

An argumentative denial is good on demurrer.

The Circuit Court has some discretion as to the order in which causes are tried; and, the contrary not appearing, it will be presumed that where a cause was tried out of its order, good ground existed for the action of the Court.

Suit upon a note for the second installment of purchase-money of real estate. Answer, failure of consideration. Reply, 1. A general denial of the answer; 2. An argumentative denial; 3. An estoppel by former judgment upon the same defense. *Quære*, whether all the matters pleaded specially might have been given in evidence upon the general denial.

APPEAL from the *Jefferson* Circuit Court.

*Monday,*  
*June 11.*

PERKINS, J.—Suit upon a promissory note.

Answer, failure of consideration, setting out the facts.

Reply, 1. General denial of the answer; 2. An argumentative denial; 3. An estoppel by former judgment upon the same defense, and in favor of the plaintiff over that defense.

Trial; judgment for the plaintiff.

A demurrer was overruled to the answer of estoppel, and we think rightly. The note sued on here was for the second installment of the purchase-money of real estate. A suit had previously been brought upon the note for the first installment, in which the same facts now relied upon

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1860.

FRENCH  
v.

HOWARD.

as a failure of consideration had been set up in the answer in bar, and a judgment had been obtained for the plaintiff on the trial of the issue upon them. The judgment, as appears from the transcript filed and made a part of the reply in this case, was, upon the merits of the same question, set up in the answer. See Ind. Dig., p. 480, and p. 482, § 18. See, as to the practice upon such an issue, and the evidence admissible, *Hargus v. Goodman*, 12 Ind. R. 629.

The conclusion we have come to on the estoppel, renders other questions in the case unimportant.

The Court overruled a demurrer to the paragraph in the answer constituting an argumentative denial. It is needless to inquire whether the ruling was right or wrong; but, according to repeated decisions of this Court, it was right.

The Court, on motion of the plaintiff's attorney, took up and tried the cause out of its order. It does not appear that those concerned in other causes objected, if, indeed, such fact could be made to appear; and though the defendant objected and excepted, he did not apply for a continuance, in legal mode, upon cause shown, even for an hour, and we think the Circuit Court has some discretion in the matter of taking up causes. We presume, the contrary not appearing, good ground for the action of the Court existed. See 2 R. S. p. 108, § 321.

Again, on the point as to the demurrer, the evidence in the cause is not upon the record. Could, or could not, all the matters pleaded specially have been given in evidence upon the general denial of the failure of consideration?

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*W. M. Dunn* and *A. W. Hendricks*, for the appellants.

*H. A. Downie*, for the appellee.

## MAULSBY v. WOLF.

May Term,  
1860.MAULSBY  
v.  
WOLF.

In order that the cause of action may be taken as confessed, on the ground that the defendant has been subpoenaed and refuses to appear, it should be shown, under § 48, 2 R. S. p. 459, that he was personally subpoenaed.

If *A.* sell goods to *B.* and *C.*, and take their notes for payment, a wager between *B.* and *C.* to determine which shall pay the notes—*A.* not being a party to the wager—cannot affect *A.*'s right of action against them.

APPEAL from the *Porter* Court of Common Pleas.

Monday,  
June 11.

WORDEN, J.—*Maulsby* sued *Wolf* and *Campbell*, before a justice of the peace, on two notes made by them to him, one for twelve and one for twenty dollars, and had judgment. *Wolf* appealed to the Common Pleas, when the plaintiff moved to dismiss the appeal on the ground that the judgment rendered by the justice was rendered by confession, from which no appeal lies. The motion was overruled and exception taken. The cause was then tried by the Court, and resulted in a finding and judgment for the defendant, over a motion for a new trial.

Two questions arise in the case—

*First.* Should the motion to dismiss the appeal have been sustained?

*Second.* Was the finding sustained by the evidence?

It appears by the justice's transcript that a subpoena was issued for *Wolf* to appear and testify in the cause as a witness, and that he failed to attend. The subpoena is not set out, nor any return thereon, but it appears by the transcript that *Wolf* "had been subpoenaed" by the plaintiff to testify as a witness.

The statute provides that "if the defendant refuse to appear on being personally subpoenaed, or being present, refuse to swear, the plaintiff's demand shall be taken as confessed," &c. 2 R. S. p. 459, § 48. No appeal lies from a judgment rendered by confession. *Id.*, § 59.

We need not determine in this case whether an appeal will lie from a judgment where the plaintiff's cause of action is taken as confessed on the ground specified in § 48, as here it does not appear that the appellant was person-

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v.  
WOLF.

ally subpoenaed, as provided for in the statute. The transcript says he was subpoenaed, but how the subpoena was served does not appear. It may have been by leaving a copy at his residence or place of business, and not by reading it to him personally, or by delivering to him a copy. In order that the cause of action may be taken as confessed on the ground that the defendant has been subpoenaed and refuses to appear, it should be shown that he was personally subpoenaed. The justice does not appear to have considered his judgment as rendered on confession, as it is rather in the form of a default.

There does not appear to have been any error committed in overruling the motion to dismiss the appeal.

On the trial, the plaintiff offered the notes in evidence, and, therefore, the defendant offered the plaintiff as a witness, who testified that the notes were given for clothing; that he did not know what arrangements were made between the defendants, *Wolf* and *Campbell*, in regard to their payment. He had heard some talk between them about betting on the election.

*Campbell* was called as a witness, who testified that there was a bet between *Wolf* and himself on the result of the presidential election in *Indiana* and *Illinois*. If those states should go for *Buchanan*, *Wolf* was to pay the notes, and if otherwise, *Campbell*, the witness, was to pay them. This was all the evidence.

It seems to us that no defense to the notes is made out. They are, *prima facie*, based upon a good consideration. The plaintiff swears they were given for clothing; that he does not know what arrangement was made between *Campbell* and *Wolf*, in reference to their payment. There is nothing in the testimony showing that the plaintiff was, in any manner, a party to the wager. The wager appears to have been exclusively between *Wolf* and *Campbell*. They had both given the plaintiff their notes. Now it does not seem to us that a wager on the result of the election, made between themselves, as to which of them should pay the notes, would release both or either of them from payment. If the clothing was sold by the plaintiff



to the defendants, and their notes taken therefor, a wager between themselves to determine which of them should pay the notes, to which the plaintiff was in nowise a party, cannot take away his right of action against them. The contract between the plaintiff and the defendants seems to be legal and valid, and cannot be defeated by an illegal contract between the defendants only, in reference to the payment. Had it been understood between the plaintiff and the defendants that, in one event, the plaintiff was to look to one of the defendants only, and, in the other event, to the other, for his pay, the case would have been entirely different.

We are of opinion that the motion for a new trial should have prevailed.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. Bradley and D. J. Woodward*, for the appellant.

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1860.

SHIREMAN  
v.  
JACKSON.

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SHIREMAN v. JACKSON.

Where *A.* sold personal property to *B.* on credit, with the condition that the title was not to pass till final payment, and that *B.* should have the possession and use the property in the meantime, but should not sell it or any part of it; and before final payment *B.* sold a part of the property, and attempted to sell the remainder: *Held*, that *A.* might peaceably take possession of the remainder for his security, the condition of the sale being broken.

APPEAL from the *Morgan* Court of Common Pleas. *Monday,*

PERKINS, J.—About the first of *September*, 1858, *Michael Shireman* sold to *Granville Jackson* a mare and colt, for 105 dollars, upon these conditions, viz.: *Jackson* was to pay 50 dollars on the 10th of the current *September*, and 55 dollars on the 10th of *September*, 1859. The title to the property was not to pass to *Jackson* till the second and last payment was made, but *Jackson* was to take posses-

*June 11.*

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1860.

SHIREMAN  
v.  
JACKSON.

sion of and use the articles sold, in the meantime, but not to sell or trade them, or either of them.

*Jackson* took possession, paid the 50 dollars, and used the mare. Before the second payment became due, and without making it, *Jackson* sold the colt, and commenced making efforts to sell the mare. He was and is insolvent.

While *Jackson* was seeking a purchaser for the mare, *Shireman*, having an opportunity to peaceably do so, took possession of her, for his own security; *Jackson* thereupon instituted this suit to re-possess himself of the mare, and recovered below.

We think the recovery was wrong.

The title to the property remained in *Shireman*, and the possession given to *Jackson* was coupled with the express condition (it would probably have been implied) that he should not sell the property. By the sale of the colt and the threatened sale of the mare, that condition was broken, and the right to the continued possession forfeited. See *Hilliard on Sales*, (2d ed.) p. 22, and note.

If *Jackson* had actually sold the mare, no title would have passed to the purchaser, and *Shireman* could have recovered the property. This is decided in *Thomas v. Winters*, 12 Ind. R. 322. Why, then, when *Jackson* was attempting to sell, should not the possession be recovered from him, whereby the perpetration of a wrong upon both the owner, and the purchaser from *Jackson*, would be prevented?

Again, had *Shireman* applied to a Court for its interference, it would undoubtedly have been in the power of such tribunal to have given back to *Shireman* the possession of the property, if necessary to his security. But if a party can peaceably obtain, by his own act, the same redress which a Court would afford him, he may do so. 3 Blacks. Comm., (Shars. ed.) p. 4, note.

Again, it may be asked, what right has *Jackson* to ask the Court in this case to aid him in perpetrating a fraud? He has broken his contract, broken the condition upon which he held the property, and was attempting to perpetrate a further breach and fraud, and can be regarded now

as invoking the aid of the Court only to enable him to accomplish his attempt. Under the code, equity is applied. For cases on conditional sales in this Court, see *Bashor v. Cady*, 2 Ind. R. 582; *Cunningham v. Banta*, *id.* 604; *Davis v. Stonestreet*, 4 *id.* 101; *King v. Wilkins*, 11 *id.* 347; and *Thomas v. Winters*, *supra*.

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1860.

WISEMAN  
v.  
RISINGER.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*W. R. Harrison, J. W. Gordon, and J. A. Beal*, for the appellant.

*A. S. Griggs and W. March*, for the appellee.

◆ WISEMAN v. RISINGER.

A record of a Court of conciliation may be given in evidence to the Court, upon a question as to costs, after the cause has been given to the jury. The original of such record will be received instead of a copy. If a party appear in a Court of conciliation, it cannot afterwards be objected that the record does not show that he had notice.

APPEAL from the *Ripley* Circuit Court.

Tuesday,  
June 12.

HANNA, J.—*Risinger* sued *Wiseman* for an assault and battery, and recovered judgment for 165 dollars.

A motion for a new trial was made, based upon two assigned causes—

1. That the verdict was contrary to the law and the evidence.

2. That the damages were excessive.

Neither the evidence, nor instructions to the jury, if such were given, are in the record. The only point made that we care to notice, is in regard to the judgment for costs, which was for the plaintiff. The record shows that, after the jury retired, the plaintiff gave in evidence to the Court, the record-book and original entry of the Common Pleas judge, in reference to an attempt to conciliate between the plaintiff and defendant as to damages for an assault and

May Term, 1860. battery. That record is dated the second day of *March*, 1859. This suit was instituted on the 28th of *July*, 1859.

CARPENTER v. DICKERSON. Three objections were made to the introduction of the evidence—

1. The law required a copy.
2. There was no notice to defendant to appear and conciliate.
3. The evidence was not admissible after the case had been given to the jury.

As to the first objection, we think the statute, taking §§ 9 and 10 (2 R. S. p. 225) together, authorizes the introduction, as evidence, of either the original entry on the record, or a certified copy of that record, and is not confined, as contended, to the copy.

As to the second objection, the record introduced showed that both parties were present in the attempt to conciliate. By § 10, above referred to, it is provided that the plaintiff cannot recover costs, unless he produce at the trial the certified copy, &c.

It is insisted that the trial was closed when the case was given to the jury, and that it was then too late to produce or offer the evidence. We think not, for the purposes intended by this statute. The jury had nothing to do with the question of the taxation of costs.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*W. S. Holman*, for the appellant.

#### CARPENTER v. DICKERSON and Another.

Tuesday,  
June 12.

APPEAL from the *Vanderburgh* Court of Common Pleas.

HANNA, J.—The appellees sued *Carpenter* for money laid out, &c., to his use.

The facts disclosed are, that the *Dickersons* were in pos-

session of a tract of land claiming title, under a warranty deed from *Roberts*, who had acquired title equally from *Carpenter* and one *Phelps* for the same land. One *Stewart* sued the *Dickersons*, *Roberts*, and *Carpenter*, to recover said lands, and recovered judgment therefor. Pending the suit, the *Dickersons*, *Roberts*, and *Carpenter* met and agreed that the *Dickersons* should proceed to purchase in a supposed outstanding title in the heirs of *Buckler*, and thereby be enabled to defend against the suit of *Stewart*, and that they would bear each his fair portion of the expense. The *Dickersons* aver they did so, and expended over 600 dollars.

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1860.

CARPENTER  
V.  
DICKERSON.

*Carpenter* answered by a denial. Trial, and judgment for the plaintiff.

The first point made is, that the evidence does not justify the amount of the finding.

Under the circumstances, we think it does. The deeds from the heirs of *Buckler* were introduced, and, for aught we can see, for the sole purpose of showing the amount of the consideration paid. They were not objected to as evidence. Perhaps they were not, if objected to, evidence against *Carpenter* of that fact. The expense of procuring the title, hunting up the heirs, &c., was proved by other evidence. The evidence thus introduced, without objection, shows the expenditure of a sum more than sufficient to make *Carpenter's* fair proportion amount to the sum named in the judgment. The answer was the general denial, and yet under it evidence was admitted relative to a compromise by *Carpenter* and *Roberts*, after *Stewart* had recovered judgment, by which *Carpenter* was to pay *Roberts* 800 dollars; but whether that was simply in discharge of his liability as the grantor of *Roberts*, or whether it also included all the expenses incident to the suit, including those incurred in procuring the *Buckler* title, was, by the evidence, left a disputed question. The Court has passed upon that evidence, and we shall not disturb the finding on that ground, even if a payment to *Roberts* would have extinguished the claim of the agent, which we do not decide. The appellees insist that the whole evidence on

May Term, 1860. that point was irrelevant under the issue. It is too late now, for the first time, to raise that question.

WILSON  
v.  
THE EVANSVILLE, &C.,  
RAILROAD CO.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.  
*J. J. Chandler* and *J. B. Hynes*, for the appellant.  
*J. G. Jones* and *J. E. Blythe*, for the appellees.

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McDANIEL v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

Tuesday,  
June 12.

APPEAL from the *Greene* Circuit Court.

*Per Curiam.*—The case of *O'Donald* against the same appellees, at this term, is similar to and determines this case (1).

The judgment is affirmed with 3 per cent. damages and costs.

*J. N. Evans*, for the appellant.

(1) *Ante*, 259.

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WILSON v. THE EVANSVILLE, INDIANAPOLIS, AND CLEVELAND STRAIGHT LINE RAILROAD COMPANY.

Tuesday,  
June 12.

APPEAL from the *Morgan* Circuit Court.

*Per Curiam.*—The judgment in this case is affirmed with 5 per cent. damages and costs, upon the reasoning in the case of *The Evansville, &c., Railroad Co. v. Shearer*, 10 Ind. R. 244.

*W. V. Burns*, *L. Barbour*, and *J. D. Howland*, for the appellant.

CONES *v.* WILSON and Another.May Term,  
1860.

CONES	14	406
<i>v.</i>	146	506
WILSON.		

By the R. S. of 1852, the personal property of a tax-payer is the primary fund out of which all taxes assessed against him upon poll, personal, and real estate, are to be collected, so long as it may be found within the county.

By the same statute, the aggregate amount of these taxes is a lien upon all the real estate of the tax-payer within the county; and no part of such real estate is discharged from the lien till the entire amount of the tax is paid; though the application of a part payment to a particular portion of such real estate, will relieve such portion from liability to sale until the remainder is exhausted. And this lien attaches on the first of *January*, annually.

An execution is a lien upon the defendant's property, as against all persons, from its delivery to the officer; yet the officer holding it should call upon the defendant for payment before he makes a levy; and a county treasurer must do so, as to taxes, before he levies upon or seizes the property by virtue of the duplicate.

The assignment of property to trustees for the payment of debts, is not such a transfer as will divest the lien of the state for taxes.

*Quære*, whether a lien for taxes holds personal property under any and all circumstances.

APPEAL from the *Decatur* Court of Common Pleas. *Tuesday, June 12.*

PERKINS, J.—*James Goodnow*, on the first day of *January*, 1858, was a resident of *Decatur* county, *Indiana*, and the owner of real estate to the value of 10,000 dollars, and of personal of the value of 2,000 dollars. On the aggregate amount of this property, there was assessed, for the year above named, a tax of .90 dollars.

On the 19th day of *November*, 1858, *Goodnow* assigned all of said property to *Forsyth* and *Wilson*, in trust for the payment of specified debts.

On the 15th day of *January*, 1859, *Goodnow* removed from *Decatur* county. Prior to *May*, 1859, all of said real estate had been conveyed to purchasers. In that month, the treasurer of *Decatur* county seized, for the payment of said tax against *Goodnow*, one hundred cords of wood, a part of the property of said *Goodnow* assigned to said trustees as aforesaid, and which had not been removed from off the premises on which it was when the assignment was made; and the question is, was that wood liable to the seizure?

May Term,  
1860.

CONES  
v.  
WILSON.

The personal property of a tax-payer is the primary fund out of which all the taxes assessed against him upon poll, personal, and real estate, are to be collected, so long as it may be found within the county. 1 R. S. p. 130, §§ 96, 101.

The aggregate amount of these taxes is a lien upon all the real estate of the tax-payer within the county, and no part of such real estate is discharged from the lien till the entire amount of tax is paid; though the application of a part payment to a particular piece or portion of such real estate, will relieve such piece or portion from liability to sale till the remaining portions are exhausted by sale. 1 R. S. p. 132, §§ 111, 112, 114.

The lien upon the real estate attaches on the first of *January*, annually. *Id.*, § 112 (1).

Section 113, on the same page of the volume cited, reads as follows:

“All the property, both real and personal, situate in any county, shall be liable to the payment of all taxes, penalties, interest, and costs charged to the owner thereof, in such county; and no partial payment of any such taxes, penalties, interest, or costs, shall discharge or release any part or portion of such property, until the whole be paid; which lien shall in no wise be affected or destroyed by any sale or transfer of any such personal property.”

This section plainly implies a lien upon personal property for all taxes; but it does not fix the time when it shall commence. As between the state and the owner at the time of assessment, it undoubtedly commences as soon as the duplicate is issued to the treasurer. See 1 R. S. pp. 129, 131.

An execution is a lien upon the defendant's property, as against all persons, from its delivery to the officer. 2 R. S. p. 131. Yet the officer holding it, should first call upon the defendant for payment before he levies upon property. Perk. Pr., p. 380.

The treasurer must do so, as to taxes, before he levies or seizes property by virtue of the duplicate. 1 R. S. pp. 129, 130.



And we do not think the mere assignment of property to trustees for the payment of debts constitutes such a transfer of it as will divest the lien of the state upon the property against the tax-payer, however it might be in case of a transfer to an absolute purchaser, in good faith, for a valuable consideration.

May Term,  
1860.

LUNG  
v.  
SIMS.

Again, it does not appear that the possession of the wood seized in this case, had ever been delivered to the assignees, nor that the deed of assignment had been recorded.

We leave the general question as to the lien of taxes upon personal property under any and all circumstances, undecided.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. Gavin* and *O. B. Hord*, for the appellant.

*B. W. Wilson*, for the appellees.

(1) See *Blackw. on Tax Titles*, 646, and note; *Doe v. Deavers*, 8 Geo. R. 479.

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### LUNG and Others v. SIMS and Another.

In a suit by the assignee of a promissory note against the maker, an answer averring that the assignor is the real party in interest, without setting up facts to show such to be the case, is bad on demurrer; and interrogatories based upon such an answer will be struck out.

APPEAL from the *Carroll* Circuit Court.

Tuesday,  
June 12.

WORDEN, J.—Action by the appellees against the appellants upon a promissory note made by the latter to *Conover* and *Kerns*, who indorsed it to the plaintiffs.

The defendants answered, amongst other things, as follows:

“2. And for further plea, the defendants say that *Cornelius Conover* and *George Kerns*, who assigned the said

May Term,  
1860.

LUNG  
v.  
SIMS.

note by the name of *Conover* and *Kerns*, are the real parties in interest, and should be made plaintiffs in this suit."

They also filed interrogatories requiring the plaintiffs to answer, and say—

1. What was the consideration given to *Conover* and *Kerns*, for the assignment of the note?

2. For what purpose was the note assigned to the plaintiffs?

3. Who are the real parties in interest in this suit?

4. Who will receive the proceeds of the judgment should one be obtained?

The Court sustained a demurrer to the answer above set out, and struck out the interrogatories.

Final judgment was rendered for the plaintiffs.

The ruling of the Court on the demurrer, and in striking out the interrogatories, is the only thing complained of as erroneous.

The ruling on the demurrer was correct. The answer set up no facts to show that the assignment of the note by the payees to the plaintiffs did not vest in them the real and beneficial interest in the note, even if such facts could be shown against the legal effect of the assignment. See *Garrison v. Clark*, 11 Ind. R. 369, and authorities there cited.

The interrogatories were correctly stricken out, because they were not relevant to any matter that was in controversy. The answer being held bad on demurrer, there was nothing left on which to base the interrogatories; and they could not be available as a kind of "fishing bill" to enable the defendant to prepare a better answer in the cause.

We see no error in the ruling of the Court, and the judgment must be affirmed.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. C. Applegate*, for the appellants.

O'BRIAN v. THE STATE, on the relation of SWIFT.

May Term,  
1860.

O'BRIAN

14	400
165	98
165	161

v.

THE STATE.

Where the record does not contain the evidence given on the trial, this Court will not hold the refusal of a new trial on account of newly discovered evidence to be error; for it cannot be known how far such newly discovered evidence was merely cumulative.

In a prosecution for bastardy, the jury may consider, in determining the credibility of the relatrix, the youth of the defendant, and the testimony of the relatrix that he never had connection with her but once, previous to which she had had no intimacy with him whatever, and had not since intimated her condition to him, or asked reparation, except by instituting the prosecution.

Where the child was born eight and a half months after the alleged single act of intercourse, it was held that the defendant might prove that the mother had had sexual intercourse with other persons within two weeks preceding and two weeks succeeding the alleged date of her impregnation, and that such proof should be considered by the jury in connection with her credibility as a witness.

APPEAL from the *Miami* Circuit Court.

PERKINS, J.—Prosecution for bastardy. Judgment for the state.

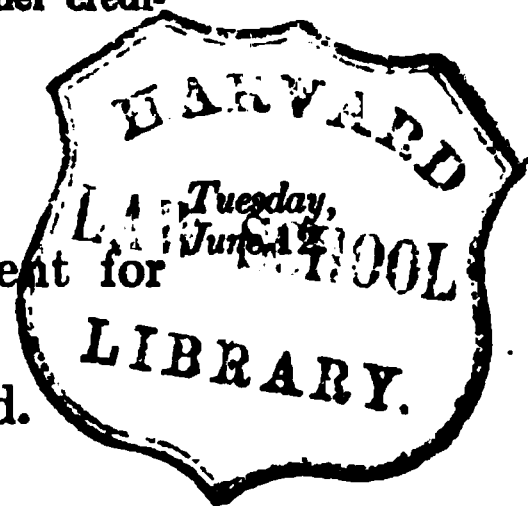
A motion for a new trial was made and overruled.

The reasons assigned for the new trial were—

1. Newly discovered evidence.

This evidence consisted in the admission of the relatrix to a certain person, that the defendant was not the father of her child, but that another person was. Such evidence would have been material; but, as the record does not show that given on the trial, we cannot say how far this newly discovered evidence may have been simply cumulative.

2. The defendant was a lad of seventeen years of age; and the mother swore that he never had connection with her but once; that she had never, before that occurrence, had any intimacy with him whatever, and had not since intimated her condition to him, or asked for reparation, except by instituting the pending prosecution. The defendant asked the Court to instruct the jury that these facts might be considered, in connection with the other facts in the case, in determining the credibility of the mother as a witness.



May Term,  
1860.

O'BRIAN  
v.  
THE STATE.

This instruction was refused, but should have been given.

3. The child was born on the first day of *July*, 1859. The mother swore that the single act of sexual intercourse with the defendant, by which the child was begotten, occurred on the 15th day of *October*, 1858, eight and a half months anterior to its birth, and the defendant offered to prove that the mother had sexual intercourse with other persons within two weeks preceding, and two weeks succeeding said 15th day of *October*; but the Court restricted such evidence to the period of one week preceding and one week succeeding that date.

The Court thus rightly conceded the admissibility of evidence of sexual intercourse with other persons, to be considered by the jury in connection with the question of the credibility of the mother as a witness; and must have adopted limitations as to times supposed to have embraced the extremes within which conception could have taken place; but most men who have been placed in that relation in life which affords opportunity for observation; and those not having been in such relation, who have investigated the subject to the extent of reading *Buchan* or *Gunn's Domestic Medicine*, know that, in the course of nature, a child, living and capable of surviving to the ordinary age of man, may be born in seven, and may not be till the expiration of ten months, or more, from the cessation of the *catamenia*, indicating the time of its conception. See, on this point, *Taylor's Medical Jurisprudence*, (2d ed.) p. 478.

The Court erred in rejecting the evidence; for if admissible in any [case], it would seem to be admissible of acts of intercourse during the periods above-named.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded for a new trial. Costs of reversal to be taxed to the relatrix.

*D. D. Pratt*, for the appellant.

## COOKERLY v. MITCHELL.

May Term,  
1860.COOKERLY  
v.  
MITCHELL.

The 30th rule of the Supreme Court adhered to.

APPEAL from the *Monroe* Circuit Court.Tuesday,  
June 12.

WORDEN, J.—Suit by *Mitchell* against *Cookerly* upon a promissory note. Trial by the Court; finding and judgment for the plaintiff.

No question is made in the case, except as to the sufficiency of the evidence to sustain the finding.

Counsel for the appellee make the point that the bill of exceptions does not comply with the 30th rule of this Court, by stating that the evidence set out “was all the evidence given in the cause.”

On the other hand, it is insisted that the record, on its face, shows that the evidence is all contained in the bill, without the statement required by the rule. The cause was not submitted on an agreed state of facts, but, as appears by the entry of the clerk, upon an agreed statement of the witnesses. The bill of exceptions states that the note was offered in evidence, and proceeds thus: “And by agreement of parties, the following statements in writing, of *Paris C. Dunning*, *David Sheeks*, and *Ambrose B. Carlton*, were submitted as evidence in the case.” Then follow the statements of the three persons named, without any statement that that was all the evidence.

In the absence of the 30th rule, this record would undoubtedly be held to contain all the evidence. But the rule was adopted to remove all uncertainty, and cut off all discussion, which frequently arose before its adoption, as to what should be deemed sufficient to show that the evidence was all in the record. It rules that the words “‘this was all the evidence given in the cause,’ shall be regarded as technical, and indispensable to repel the presumption of other evidence.” This rule has been rigidly adhered to in this Court since it took effect, and has generally been found to answer the desired purpose, without working hardship to suitors, except, perhaps, in a few cases arising

May Term,  
1860.

HALL  
v.  
REYNOLDS.

before the rule was generally understood. We do not think there is now any necessity for relaxing the rule, or good reason for holding the present case to be an exception. Hence, we must presume that the finding was sustained by the evidence, without looking into the evidence which is set out.

*Per Curiam*.—The judgment is affirmed with 5 per cent. damages and costs.

*J. Hughes*, for the appellant.

*J. L. Ketcham* and *I. Coffin*, for the appellee.

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### HALL v. REYNOLDS.

In a suit before a justice, the defendant appeared and answered, setting up a set-off larger than the plaintiff's claim, but failed to appear at the trial. Judgment was rendered against him as by default, and he appealed to the Circuit Court, where he recovered a judgment against the plaintiff for the excess of the set-off over his claim. *Held*, that there was such an appearance as entitled the defendant to costs, the justice's judgment being reduced more than five dollars.

Where the right to costs depends upon the evidence, and the evidence is not in the record; or where it depends upon the record, which itself does not show the ruling of the Court to have been wrong, the Supreme Court will presume the ruling to have been correct; but this rule has no application to a case where the defendant's right to costs depends upon his having reduced a justice's judgment more than 5 dollars.

Tuesday,  
June 12.

APPEAL from the *Boone* Circuit Court.

WORDEN, J.—*Reynolds* sued *Hall* before a justice of the peace, on a promissory note, claiming 52 dollars, 97 cents. *Hall* appeared, and by answer filed a denial to the claim, and also filed an offset amounting to 64 dollars. When the cause was called for trial before the justice, the defendant failed to appear, whereupon it was adjudged by the justice that the plaintiff recover, as by default, the sum claimed to be due. *Hall* appealed to the Circuit Court, and upon trial the plaintiff had judgment against him for

12 dollars, 47 cents. The defendant moved to tax the costs against the plaintiff, but the motion was overruled and judgment was rendered for the plaintiff for costs.

May Term,  
1860.

HALL  
v.  
REYNOLDS.

The question thus raised as to costs, is the only one involved in the case here.

The case of *Holcomb v. McDonald*, 12 Ind. R. 566, establishes that there was such an appearance in this case, by the defendant before the justice of the peace, as entitled him to costs in the Circuit Court, the justice's judgment being reduced in the latter Court more than 5 dollars. 2 R. S. p. 464, § 70.

But the counsel for the appellee claims that as the evidence is not in the record, it must be presumed that the ruling as to costs was correct. This position would be well taken if the defendant's right to recover costs depended upon the evidence, as in *Ham v. Gregg*, 1 Ind. R. 81, where the Court say that "if the plaintiff makes out on the trial, in proof, a *prima facie* claim to over 50 dollars, he will be entitled to costs, although the effect of the defendant's evidence may be to reduce his right of recovery, finally, below that sum. As the evidence in this case is not upon the record, and it appears that both parties gave evidence to the jury, we cannot say that the Court below erred in taxing costs." The counsel cites the cases of *Nichols v. Woodruff*, 8 Blackf. 493; *Burnett v. Coffin*, 4 Ind. R. 218; and *Conner v. Winton*, 10 *id.* 25. These, and other similar cases, undoubtedly establish the proposition that where the right to costs depends upon the evidence, which is not in the record; or where it depends upon the record, which itself does not show the ruling of the Court to have been wrong, this Court will presume the ruling to have been correct.

But this principle has no application to the case at bar. Here the defendant's right to costs depends upon his having reduced the justice's judgment more than 5 dollars, and not upon the evidence in the cause. If the evidence did not sustain the finding, it might have been set aside; but this was not asked, and behind the finding we cannot go.

May Term,  
1860.

JONES  
v.  
THOMAS.

The justice's transcript filed on the appeal of the cause, undoubtedly constitutes a part of the record, so that it affirmatively appears by the record that the judgment by him rendered was reduced in the Circuit Court more than 5 dollars; hence, under the provisions of the statute, the defendant was entitled to judgment for costs.

*Per Curiam.*—The judgment for costs is reversed, and the cause remanded. Costs here in favor of appellant.

*O. S. Hamilton*, for the appellant.

*L. C. Dougherty*, for the appellee.

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### JONES v. THOMAS.

A sheriff or his deputy taking property in attachment, may keep it himself, and receive the amount allowed by the Court therefor, or he may employ some one to keep it, pay him therefor, and receive the amount, collected as part of the costs, unless he pay the keeper more than the Court will allow.

Tuesday,  
June 12.

APPEAL from the *Porter* Circuit Court.

PERKINS, J.—*Jones* was sheriff of *Porter* county. His deputy seized certain property (three horses) by virtue of a writ of attachment. He delivered the horses to *Thomas* for keeping, no delivery-bond having been executed for them by the person in whose possession they were seized. *Thomas* kept them nine months; and this suit was against the sheriff for compensation for such keeping. When the horses were delivered to *Thomas* by the deputy sheriff, the latter told him the compensation would be what the law allowed. This was all the evidence of the contract under which the horses were kept. The Court allowed 290 dollars.

We think the decision was right.

The code provides that the sheriff shall be allowed by the Court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the



costs. The sheriff, then, had a right to provide for the keeping of the attached property; and the deputy to whom the writ was given for execution would, in the absence of any special interference or instructions on the part of the sheriff, have the same power, as incident to the execution of the writ, and the sheriff would be bound by his act. 2 R. S. p. 11, § 4. The officer might have kept the property himself, and received the amount allowed by the Court therefor; or he might, as was done in this case, employ some one else to keep it, pay him therefor, and receive the amount collected as part of the costs, if he did not pay the keeper more than the Court would allow. If he did, it would be his loss.

May Term,  
1860.

BURGESS  
v.  
MATLOCK.

Why the property was kept so long as it was in this case, when the law allowed an earlier sale, we do not know; nor is it a matter into which *Thomas* was bound to inquire. See 2 R. S. p. 67, §§ 174, 175.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. B. Niles*, for the appellant.

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### BURGESS v. MATLOCK and Another.

The statute in reference to filing a transcript of a justice of the peace, is merely directory as to the hand of the person by whom he shall lodge the transcript with the clerk.

The defendant in a proceeding in garnishment, may appeal, under the general statute, from the judgment of a justice.

APPEAL from the *Hendricks* Court of Common Pleas. *Tuesday, June 12.*

HANNA, J.—The appellees caused an attachment to be issued by a justice of the peace, in a proceeding against one *Hopwood*. At the same time, process of garnishment was taken out against the appellant, on the ground that he had “the control and agency of moneys belonging to

May Term,  
1860.

BURGESS  
v.  
MATLOCK.

and due said defendant" (*Hopwood*). A summons was issued against *Hopwood*, and returned not found; also the order of attachment was returned, no property found. On the same day, the defendant was called and a judgment rendered against him. *Burgess* appeared and answered; a judgment was rendered against him, ordering him to pay into Court the amount for which the judgment was so rendered against *Hopwood*. From this judgment, the record shows, *Burgess* appealed to the Common Pleas, where, on motion of the plaintiffs, the appeal was dismissed.

The reason for the dismissal is not disclosed in the record. The brief of the appellees states that the reason was that the transcript of the justice's judgment, &c., was filed by the attorney of the said *Burgess*, and not by the justice, in the clerk's office. The appellant places the action of the Court on the ground that it decided that no appeal lay in favor of the garnishee.

Neither of the reasons is sufficient. The record shows that *Burgess* appealed. The statute in reference to the duty of the justice as to filing a transcript, is merely directory as to the hand of the person by whom he shall lodge the transcript with the clerk.

We do not see any reason that should prevent a defendant in a proceeding in garnishment, from availing himself of the general statute allowing appeals from the judgment of a justice. His rights might be as much affected, and wrongfully, as if the proceeding was in the nature of an original suit directly against him.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*L. M. Campbell*, for the appellant.

*C. C. Nave*, for the appellees.

May Term,  
1860.

## SIPE v. SIPE.

SIPE  
v.  
SIPE.

Complaint by *A.*, administratrix, against *B.* as executor of his own wrong, for intermeddling, &c., laying the acts on the 6th of *November*. Answer, 1. A general denial; 2. A denial, and averment of property in defendant; 3. Denial that he was executor, &c. Reply in denial. After the evidence had been heard and the argument began, the plaintiff was permitted to amend the complaint by striking out *November* and inserting *October*. The evidence showed that the deceased died on the 2d of *October*, and that the plaintiff obtained letters on the 30th of that month. The jury found specially that the defendant intermeddled at all times after the death of the decedent until the last of *November*.

*Held*, 1. That the time laid should bring the case within the statute of limitations, and that the evidence should, perhaps, show that the acts complained of preceded the grant of letters, &c.

2. That the amendment met the evidence, and did not change either claim or defense.

3. That the costs prior to the amendment were properly charged against the defendant.

Where only a general objection is taken to the ruling on instructions, and they are as favorable to the appellant as he has a right to ask, the objection will not be noticed.

APPEAL from the *Randolph* Court of Common Pleas. *Tuesday, June 12.*

HANNA, J.—*Mary Sipe*, as administratrix of the estate of her deceased husband, sued *John Sipe*, as executor of his own wrong, for intermeddling with the property of said decedent, averring in the complaint that such acts of intermeddling took place on the 6th day of *November*, 1856.

The defendant answered—

1. A general denial.

2. A denial, and averring that the property was the property of the defendant.

3. A denial that he was executor of his own wrong, as charged.

Reply, in denial.

Trial; verdict for the plaintiff; and also answers to interrogatories propounded. Motion for a new trial overruled, and judgment for the amount of the verdict, and 10 per cent. damages. The evidence is in the record.

After the evidence had been heard, and the argument to the jury had begun, on the plaintiff's motion she was per-

May Term,  
1860.

- Sipe  
v.  
Sipe.

mitted to strike out the word *November*, and insert in its stead the word *October*, in the complaint.

This is the first error complained of. The evidence showed that the deceased died on the 2d of *October*, 1856, and that the plaintiff obtained letters, &c., on the 30th of the same month. The date of the intermeddling, as originally charged, was on the 6th of the next month—by the amendment, it was placed a month earlier.

It is insisted that the evidence should have been confined to the time charged, and as that was after the grant of administration, that a case against the defendant, in the character in which he was sued, could not have been sustained upon the original complaint; and that the amendment was a change of the issue, in substance, and ought not to have been permitted, &c.

This reasoning is not sound. The time laid in the complaint should bring the case within the statute of limitations, and the proof should, perhaps, show that the acts complained of preceded the grant of letters of administration.

There was a special interrogatory upon this point to the jury, who returned that the defendant “intermeddled with all the property at all times, after the death of *Henry Sipe*, until the last of *November*.”

The amendment was, perhaps, immaterial. At most it was only such an one as met the evidence, and did not substantially change either the claim or defense. 2 R. S. p. 48, § 99. No new issue was thereby made or tendered. *Trees v. Eakin*, 9 Ind. R. 556.

Many instructions were given to the jury, some asked were refused, and others modified. The defendant does not point out any other than a general objection upon this point; and as the instructions, all taken together, are fully as favorable as he had a right to ask, we will not further notice them.

The next point made, is upon the refusal of the Court to tax the cost made prior to the amendment, against the appellee. If the view we have already taken of that amendment is correct, there was no error in that ruling.

It is insisted that a new trial should have been granted; that the evidence did not sustain the verdict upon two points; first, as to the intermeddling after the death and before administration; and second, if it did, the amount found is too large. Both these questions were, as to defendant, fairly put to the jury, together with the last one raised, namely, that if the defendant took possession of the property, under a claim of title, he was not liable in this suit. The jury passed upon these questions, and, as there was evidence tending to sustain the verdict, we cannot disturb it.

May Term,  
1860.

BUTLER  
v.  
MERCER.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. Brown and W. A. Peelle*, for the appellant.

*T. M. Browne, S. Colgrove, and J. J. Cheney*, for the appellee.

BUTLER and Others v. MERCER.

APPEAL from the *Elkhart* Court of Common Pleas.

Tuesday,  
June 12.

*Per Curiam.*—Suit for disturbance of the occupancy and possession of a dwelling house, and injury to the same, by breaking the windows, &c. Recovery by the plaintiff.

The Court instructed the jury that if the injury to the house was malicious, they might give vindictive damages. As a malicious trespass is punishable criminally, it is not punishable civilly. *Tabor v. Hutson*, 5 Ind. R. 322.

The judgment is reversed with costs. Cause remanded, &c.

*E. M. Chamberlain, T. G. Harris, and J. H. Baker*, for the appellants.

May Term,  
1860.

COPLINGER v. THE STEAMBOAT DAVID GIBSON.

COPLINGER  
v.  
THE STEAM-  
BOAT DAVID  
GIBSON.

The water-craft law of *Indiana*, providing for the enforcement of liens on vessels, does not extend to contracts made and broken out of this state, and consequently an attachment suit will not lie for a breach of such a contract.

An action *in rem* would not lie at common law.

The law of a foreign state, where such a contract was made or broken, will not be enforced in a suit upon the contract in this state, unless the law be pleaded and proved, and even then, no further than our system of practice will enable the Courts to enforce it.

A suit *in personam*, as at common law, would lie, and the action would be transitory; but to maintain it, jurisdiction of the person would have to be acquired, either by service of process or voluntary appearance.

The filing of an attachment-bond, and taking depositions on behalf of a vessel, do not constitute a voluntary appearance to the suit, as one *in personam*. *Semble*, that the plaintiff in an attachment suit under the statute, might move for leave to amend his complaint, and to have process against the person, so as to change his proceeding to a common-law action.

Tuesday,  
June 12.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—*Coplinger* filed his complaint in the *Jefferson* Circuit Court, alleging that he shipped certain articles of freight upon the steamboat *David Gibson*, at *Cincinnati, Ohio*, to be delivered to one *Johnson*, at his landing in *Chicot*, state of *Arkansas*, for a certain consideration to be paid; that the articles were not delivered at said landing in *Chicot*, but were taken to and left at *New Orleans*, in the state of *Louisiana*; that damages accrued to him, by the breach of said contract, to the amount of 350 dollars, which, he prayed, might be enforced against said steamboat *Gibson*, then lying in the waters of the *Ohio* river, opposite *Jefferson* county, *Indiana*. The boat was seized by, and was bonded out from under, an attachment, in vacation, her master executing the bonds, who also took some depositions touching the case, during the vacation.

At the next term of the Court, when the cause was called, the plaintiff moved for a rule for an answer, and the defendant interposed a motion that the attachment be discharged or quashed, and the suit dismissed for causes then assigned.

The Court sustained the defendant's motion, and dismissed the cause.

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This proceeding was instituted under the water-craft law of *Indiana*; but the case of *The Steamboat, &c. v. Richardson*, 9 Ind. R. 525, decides that that law does not extend to contracts made and broken out of this state. Perk. Pr., p. 520 (1). It is clear from the allegations of the complaint, that the contract described therein was made and broken out of this state.

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Such a proceeding is not authorized by the common law.

But it was contended that the law of *Ohio* upon this subject was similar to that of *Indiana*, and that the Courts of *Indiana* would enforce the *Ohio* law. They might have done so, had the *Ohio* law been pleaded and proved; not otherwise. *Wilson v. Clark*, 11 Ind. R. 385. Even were the *Ohio* law pleaded in a given case, the Courts of this state would not enforce it further than our own system of judicial proceedings would enable them to do so. *Doe v. Collins*, 1 Ind. R. 24. See 4 Am. Law Reg., pp. 119, 747.

The pending suit could not, then, be maintained against the boat, and the attachment was rightly quashed.

Was the suit rightly dismissed?

A suit *in personam*, as at common law, could be maintained on the cause of action described in the complaint; and the action would be transitory; but to maintain it, jurisdiction over the person would have to be acquired, either by service of process, or the voluntary appearance of the party.

The filing of the bond and taking of depositions in this case, did not constitute a voluntary appearance to the suit, as one *in personam*. Ind. Dig., pp. 126, 154.

When the attachment was quashed, then, there was on file in the Court simply a complaint for an attachment. For that purpose, it was unavailing, and should not encumber the docket. Had the plaintiff interposed a motion, before the cause was dismissed, for leave to amend his complaint, and for process against the person, so as to

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have changed his proceeding to a common-law action, perhaps such a motion should have been granted.

*Per Curiam*.—The judgment is affirmed with costs.

*H. W. Harrington*, for the appellant (2).

*W. M. Dunn* and *A. W. Hendricks*, for the boat (3).

(1) 2 R. S. p. 183.

(2) Mr. *Harrington* contended that when the master or other person appears and bonds out the vessel, the action becomes personal; that the Court did not pass upon this point in *Carson v. The Talma*, 3 Ind. R. 194, decided under the statute of 1843. That the complaint does not show that the contract was made out of the state, and that there is no legal presumption that it was made in another state. 2 Hill, 201. That the case of *The J. P. Tweed v. Richards*, 9 Ind. R. 525, was disposed of upon the proof and the merits; that in that case no part of the contract was to be performed within the waters of this state, and there was no proof that the laws of *Louisiana* or *Tennessee* gave a lien upon the boat, &c. That the attachment was erroneously set aside; that the *lex loci contractus* may control even where the contract is to be performed and is broken wholly in another state, *i. e.* if the *lex loci* gives the right, and the *lex fori* a remedy, that remedy may be enforced in our state. 9 Ind. R. 525. —Story's Conf. of Laws, § 3226. That upon the motion to quash the attachment, and before the decision, the appellant produced before the Court an authenticated copy of the statute of *Ohio* giving the remedy against the boat; and read it in the argument, the issues not then being formed, and the same is before this Court. That if the attachment was properly set aside, it was error to dismiss the entire action; that the case was not like a foreign attachment, a party having appeared, and, by giving bond, changed the action from one *in rem* to one *in personam*. 6 Blackf. 291.—2 Ind. R. 535.—1 *id.* 121. That, hence, if the complaint was substantially defective, the defendant should have demurred. That the objection that the plaintiff could not bring the action, was not tenable, even if it could have been made upon motion. *Hancock v. Ritchie*, 11 Ind. R. 48.

(3) Messrs. *Dunn* and *Hendricks*, *contra*:

That this water-craft lien law applies only to contracts made in this state, or, at least, those made with reference to the laws of this state, is a proposition now well settled. *The J. P. Tweed v. Richards*, 9 Ind. R. 525.—*The Steamboat Champion v. Jantzer*, 16 Ohio R. 91.—*Goodsill v. The Brig St. Louis*, 16 *id.* 178.

The general principle that such statutes can have no extra-territorial operation has long been well established.

As long ago as 1820, this Court held that our statute making certain words actionable, could not be applied to words spoken out of the state. 1 Blackf. 71. It is "held that a statute giving damages to a personal representative, or to surviving relatives for destruction of life, has no extra-territorial effect." *Campbell v. Rogers*, in the Superior Court of Cincinnati, 4 Am. Law Reg., 747. Many similar cases might be cited.



But it is said that the complaint does not show that this contract to transport was made without the state of *Indiana*. Here we differ upon a point of fact simply, and ask that the question be tried by the record. As we read the complaint, it shows that the property was shipped at *Cincinnati, Ohio*, to be transported to *Johnson's* landing in *Arkansas*, in which last-named state the contract is alleged to have been broken. The complaint certainly says, "and that the said *McKinley*, captain at said time of said boat, received said property on board said steamer at *Cincinnati, Ohio*, and agreed to carry the same from said place to said *Johnson's* landing aforesaid." The complaint shows where *Johnson's* landing is, viz., in the county of *Chicot*, and state of *Arkansas*, and opposite to *Point Worthington*, in *Mississippi*.

But it is suggested that as the boat in performing her voyage, must necessarily navigate the river border of this state, she therefore became liable to the laws of *Indiana*. We will not here stop to argue that the *Ohio* river bordering upon this state, is not within it, and forms no part of it; that its north-eastern low-water mark bounds our territory; that it is a common highway along our border, the fee simple or ultimate dominion of which, beyond low-water mark, is in *Kentucky*, though *Indiana* has a limited jurisdiction over it. We will not, either, attempt to point out the intolerable confusion and evil that would result, if it should be established that a contract of affreightment made in *Ohio*, to be performed in *Arkansas*, is subject to the local laws of each and every riparian sovereignty along whose borders the boat must pass in performing her voyage. We will only, upon this point, say that we know of but two jurisdictions whose laws have been allowed to govern contracts, viz., the laws of the place of the contract, and those of the place of performance. We need not here inquire which law would govern in this case. The result here would be the same, whether the law of *Ohio* or that of *Arkansas* applies. This proposition of plaintiff's counsel seems to us to be entirely novel, and he has not thought it necessary to fortify it either by authority or reasoning.

But it is said that a motion to dismiss would not lie; that although the action was at first *in rem*, yet a bond being filed and the boat discharged, it became a proceeding *in personam* against the master. This is true. It was so held under the water-craft law of 1843, and the decisions are equally applicable under the present code. But it is also true that under the code of 1843, the same use was made of the motion to dismiss, that was made in this case, and that the practice was held correct in this Court.

It is true, that after bond filed, the action became personal against the master, but for what? Certainly for any claim that may be established under the statute against the boat, and no other. The legal effect of his bond, and of the judgment *in personam* against him, is that he shall respond personally to any claim that the boat would have been subjected to had she remained in the custody of the law. It does not become a personal action to enforce any personal claim that may have existed previously against the master, but simply to enforce against him personally any claim that may be found a lien under the statute against the boat. It surely would not be pretended that after a boat has been attached, say, as for supplies furnished, and the master has procured her release by substituting his own bond with surety, the plaintiff might go on to prove any individual claim against him or the owners of the boat, though constituting no lien under the statute against the boat. This would render the water craft law an efficient machinery for fictitious commencement

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of suit, and might seriously confound the statutes giving to the Courts their jurisdiction over the persons of defendants. The bond may be given by the defendant herself, or by the master, owner, or consignee, and its condition is, "that the defendant will perform the judgment of the Court." 2 R. S. p. 184, § 661.

This clearly indicates the truth of what we contend for, viz., that the substituted defendant is liable *in personam* only for whatever judgment the vessel herself would have been liable for, if she had not been bonded out and discharged. In 1 Ind. R. 123, the Court, speaking of a water-craft attachment-bond, say: "It was, in most respects, similar to an appeal-bond, and upon non-payment of the proper judgment in the attachment suit, its conditions would have been broken." We understand that such a bond covers only such claims as exist against the boat—that is, such claims as the statute makes liens upon the boat, and for the recovery of which the boat may be sued as a person. If this is true, it must necessarily follow that when the attachment is discharged, the action goes out of Court—nothing remains to be adjudicated upon. If it may still proceed *in personam* against the substituted party, then there is no practical difference between an attachment authorized by statute, and one not authorized—between one regularly issued, and one irregularly issued. In either case, the master or owner is compelled to give bond to obtain restitution of the boat, or to have her tied up in port while the suit is pending. If he does give bond, it matters nothing, according to this doctrine, whether there was any lien under the statute against the boat or not, provided there existed a personal lien against the master or owner. By virtue of the attachment, as it is claimed, the Court has obtained jurisdiction to try the personal claim against the master or owner, even though the attachment was utterly unauthorized by law, and notwithstanding the Court might have had no jurisdiction of the person of the master or owner by reason of his residence, if the suit had been brought in the ordinary way. *The Lawrenceburgh Ferry-Boat v. Smith*, 7 Ind. R. 520, shows that the personal judgment must be for whatever the boat would have been liable for *in rem*, had there been no substitution. There *Pratt* neither owed, nor was liable for anything personally. If in such case, the judgment is rendered against the boat, it is considered but a formal error. *Ibid.*

When it is urged that a motion to quash an attachment will not lie after a natural person has come in as defendant, we simply answer that it is decided differently. *Carson v. The Talma*, 3 Ind. R. 194. The practice of moving to quash is familiar in all cases of seizure either of property or person. This being entirely a statutory proceeding, the attachment should appear on the face of the proceedings to be authorized by the statute. A steamboat can be treated as a person, only where the statute clearly authorizes it to be so treated. If the complaint on which the attachment is issued, shows that the proceedings were not within the statute, and that the seizure was unlawful, a motion to quash is obviously proper.

But it is said that in this case the motion came too late, and was waived—

1st. Because the boat had been bonded out in vacation.

2d. Because the parties had taken depositions in the case in vacation.

As to this first reason for the objection, it is set at rest by the case in 3 Ind. R. 194. It is true, as stated, that that decision was made under the statutes of 1843, but it is equally applicable to the similar provisions of the present code.

Where an irregular attachment might be made in vacation of Court, it would be most unreasonable to say to the owner of a boat, "you must either waive this irregularity, or suffer your vessel to remain in custody, rotting in the docks, until Court meets." It is but reasonable that he should be allowed to give security equivalent to the boat herself for the performance of any judgment that might go against the boat, and then come into Court with the same rights he would have if the boat was still held by the sheriff. This course operates hardship upon neither party. In procuring restitution of his boat, he only admits that she was attached, not that she was regularly attached. He waives no irregularity, for he has no opportunity to complain of any, and, hence, it is decided as in 3 Ind. R. 194.

As to the other reason assigned for the position that the right to the motion was waived, viz., that the parties had taken depositions in the case, we have only to say that this is the first time we ever heard it suggested that taking depositions in vacation is an appearance to the action.

Again, it is urged by plaintiff's counsel, that though a lien may not exist on the boat, under the statute of this state (although he says in his brief that the proceedings were commenced under the *Indiana* statute), still the proceedings would lie under the *Ohio* statute, and that statute was brought to the attention of the Circuit Court, by being read to the Court by plaintiff's counsel in his argument.

We do not feel called upon here to discuss the question whether this proceeding might or might not have been maintained, if it had been commenced in an *Ohio* Court. We merely submit, first, that the *Ohio* statute was neither pleaded nor proved in the Circuit Court; and, second, that if it had been, our Courts would not enforce the peculiar remedies known to the practice of other states.

Suppose the pleadings had gone on to issue in the Court below, and the plaintiff had replied the *Ohio* statute. This would have been bad—

1st. Because it would have been a departure—the complaint counting upon a lien under one law, and the reply upon a lien under another.

2d. It would have been an attempt to enforce in *Indiana* not only a right springing out of an *Ohio* statute, but to do so by means of the peculiar machinery prescribed by the *Ohio* legislature to the *Ohio* Courts. This could not have been allowed. 16 Ohio R. 180.

But it is unnecessary to speak of what might have been or might not have been done, since the fact is that the suit was commenced under our own watercraft law, and the *Ohio* law was, in no legal sense, before the Court at all.

This whole case, then, is simply this: The plaintiff files a sworn complaint against the boat, showing a contract made in *Ohio*, to be performed in *Arkansas*, and broken in *Arkansas*. He has the boat seized under his attachment in vacation, and *McKinley*, the master, gives bond to the sheriff, and obtains her discharge. At the first term, and on the first calling, the defendant moves to quash the attachment, because the complaint shows no facts bringing the case within the statute authorizing such attachment, and the motion was sustained.

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14	486
126	595
14	486
135	230

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The certificate of acknowledgment of a deed was not bad, under the statute of 1838, for not stating that the wife was examined separate and apart from her husband, and the contents of the deed made known to her, as it is presumed, the contrary not appearing, that the officer taking the acknowledgment did his duty in this regard.

If the ground of objection to testimony do not appear, the objection will not be noticed on appeal.

Where there was no motion for a new trial on that ground, the refusal of the Court to give instructions is not assignable as error.

Where the evidence is not in the record on appeal, it will be presumed to have sustained the verdict.

It cannot be assigned as error that the jury did not find specially touching a given fact, if it do not appear that the Court directed them to do so.

Section 5 of the act organizing the Court of Common Pleas, giving that Court concurrent jurisdiction with the Circuit Court in all actions against heirs, devisees, &c., is not repealed or limited by the exception in § 11 of the same act, nor by § 5 of the act organizing the Circuit Court.

An exception to an authority granted by one section of a statute, cannot be held to qualify another and a different authority granted by another section in unqualified terms.

Thus the Common Pleas has jurisdiction in actions against heirs, &c., though the title to real estate be in issue, and the amount in controversy be more than 1,000 dollars.

An allegation that a person sold and conveyed land by deed, imports a conveyance in fee.

Tuesday,  
June 12.

APPEAL from the *Lagrange* Court of Common Pleas.

WORDEN, J.—Action by the appellees against the appellants to establish the existence of certain deeds alleged to be lost, and for the specific performance of certain contracts, &c.

Answers were filed, issues joined, and the cause tried by a jury; verdict and judgment for the plaintiffs.

The defendants appeal and assign ten errors, which will be noticed in their order:

1. "The deed of *Newton* was not properly acknowledged by the wife, and the Court erred in permitting the record of it to be read to the jury."

The objection made to the introduction of the record of the deed was, "that the certificate of acknowledgment

was so defective that the deed did not convey the wife's interest in the land." The deed was executed by three men and their wives, and the justice who took the acknowledgment certifies that they all appeared before him and acknowledged the execution of the deed, &c., and that the *femes covert*, naming them, "being separate and apart from, acknowledged that they executed the same freely, and without fear or compulsion from their husbands." The certificate does not state that they were separate and apart from their husbands, nor that the contents of the deed were first made known to them. But all this was unnecessary. The deed was executed under the statute of 1838, which is the same as that of 1824. In *Stevens v. Doe*, 6 Blackf. 465, it was held, under the latter statute, that it would be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and making her acquainted with the contents of the deed, and that those facts need not be certified. The acknowledgment in question is undoubtedly good under the decision above mentioned, which we prefer to follow rather than some cases cited from *Ohio* to the contrary (1).

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It may be observed that the code of 1843 requires the officer to state in his certificate of acknowledgment all the matters required to make the acknowledgment valid. R. S. 1843, p. 420, § 40.

2. "The Court erred in permitting the plaintiff below to prove the contents of two other deeds, and in refusing to strike out the evidence of them when it was shown that they were in existence, and under the control of the plaintiff."

There is a stipulation of counsel filed in the cause, by which it is agreed that that portion of the bill of exceptions, on which this assignment is predicated, shall be deemed to be stricken out.

3. "The Court erred in permitting *Potter*, one of the plaintiffs below, to swear to the contents of lost deeds."

The testimony was objected to, but the ground of the objection was not stated. Parties are competent witnesses

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for some purposes, and the ground of objection to this particular testimony should have been pointed out, if any existed. *Mc Gill v. Kennedy*, 11 Ind. R. 20, and cases there cited.

4. "The Court erred in refusing to instruct the jury that the evidence of *Potter* could only be taken for the purpose of proving the loss or destruction of the deeds, and for no other purpose."

There was no motion for a new trial, on the ground that the Court refused to give instructions. *Kent v. Lawson*, 12 Ind. R. 675.

5. "The evidence was not sufficient to sustain the verdict."

The evidence is not in the record; hence, we must presume it was sufficient.

6. "The jury should, at the request of the defendants below, have found what kind of a deed was made by *Newton* and wife."

The bill of exceptions shows that, at the proper time, the defendants, *Newtons*, moved the Court to require the jury, in case they should find a general verdict, to find specially, amongst other things, whether *Datus Newton* made a deed to *Brayton*, and if so, what kind of a deed was it, a quitclaim, mortgage deed, or warranty deed. It does not show, however, that the Court required the jury, in case they found a general verdict, to return such special answers, nor is there any exception taken to the refusal of the Court to give such direction. The jury, however, did return, in addition to a general verdict for the plaintiffs, a special finding that "*Datus Newton* made a sufficient deed of conveyance to *Abram Brayton*." Whether this was a sufficient answer to the interrogatories sought to be propounded to the jury, we need not determine, as it does not appear that the jury were required by the Court to answer special interrogatories at all.

7. "The Court erred in refusing to grant a new trial."

The evidence is not before us, and there is no apparent reason why a new trial should have been granted.

8. "The title to land was put in issue by the pleadings

and by the evidence, and the Court erred in refusing to dismiss the cause.”

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This assignment of error raises the most difficult question in the case.

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The land mentioned in the deeds sought to be established, seems to have been owned by *Asa Flint* in his lifetime, and some of the defendants answered that they are, as the heirs at law of *Asa Flint*, deceased, the owners in fee of the undivided four-sevenths of the land, and they ask to have partition made thereof.

Replication in denial.

The defendants thus answering, seek a partition of the land, claiming ownership of a part thereof; but we do not deem it necessary to decide whether the case falls within the decision of this Court in the case of *Walcott v. Wigton*, 7 Ind. R. 44, where it was decided that the Court, having jurisdiction in partition, had the power to settle all questions of title arising, as incidental to a proper partition. The case, we think, stands upon different ground. The jurisdiction of the Court, if it have jurisdiction in this case, depends, perhaps, not upon its right to make partition, and, as incidental thereto, to settle questions of title, but upon the nature of the title set up by the defendants, and the character in which they claim the ownership of the land. The case of *Walcott v. Wigton*, however, settles an important principle in the construction of our statutes, which, if applied to this case, must sustain the jurisdiction of the Court below.

There are three statutory provisions that seem to have a bearing on this question. Section 5 of the act organizing Circuit Courts, (2 R. S. p. 5,) confers exclusive jurisdiction upon the Circuit Courts, in all cases “where the title to real estate shall be in issue, and where the amount involved is 1,000 dollars or upwards.”

Section 5 of the act organizing Courts of Common Pleas, (2 R. S. p. 17,) gives the Circuit and Common Pleas Courts concurrent jurisdiction “in all actions against heirs, devisees, and sureties of executors, administrators, and guardians, in the partition of real estate, assignment



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of dower, and the appointment of a commissioner to execute the deed on any title-bond given by the decedent."

Section 11 of the same act gives the Court of Common Pleas concurrent jurisdiction with the Circuit Court in all civil cases where the sum due or demanded, or the damages claimed, shall not exceed 1,000 dollars, except for slander, libel, breach of marriage contract, action on official bond, &c., and where the title to real estate shall be in issue.

The defendants, setting up title in themselves, are sued as heirs of *Asa Flint*, and they claim title as such heirs. There is no doubt that § 5 of the act organizing the Court of Common Pleas, when taken by itself, gives the Court jurisdiction in suits against heirs, although the title to real estate be involved. The jurisdiction thus conferred by that section is unlimited, and unqualified in this respect. It is such as ordinarily attends Courts having the settlement of the estate of deceased persons, whether denominated Probate Courts or called by any other name. This Court has decided that a statute authorizing a party to proceed in the Court of Common Pleas to foreclose a mortgage, gives that Court jurisdiction, although the title to real estate be put in issue. *Holliday v. Spencer*, 7 Ind. R. 632. So here, the statute gives that Court jurisdiction in suits against heirs, and in such cases the jurisdiction is not divested because the title to real estate comes in question, unless some other statute takes it away.

The exception in § 11 of the same act cannot have that effect. That section gives the Court an extended jurisdiction, beyond that contemplated in § 5, and beyond that of a Probate Court proper, and the exception qualifies only the extended jurisdiction thus conferred. An exception to an authority granted by one section of a statute, cannot be held to qualify another and a different authority, granted by another section in unqualified terms. But the provision in the act organizing Circuit Courts, conferring upon those Courts exclusive jurisdiction when the title to real estate shall be in issue, presents more difficulty. This provision was approved after the others mentioned, and it might, with much plausibility, be contended that it repeal-



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ed, by implication, everything inconsistent therewith. But this question was involved in the case of *Walcott v. Wigton*, *supra*. The same section of the law which gives the Common Pleas jurisdiction in partition, gives it in suits against heirs. It was held that the jurisdiction in partition was unaffected by the Circuit Court act, although the title to real estate was put in issue. In other words, it was virtually determined that the law giving the Circuit Courts exclusive jurisdiction in all cases where the title to real estate shall be in issue, should not be construed to extend to cases of partition. The same principle has been held in another case. *Wiggins v. Holman*, 5 Ind. R. 502. There it was held that in suits against administrators, the jurisdiction of the Common Pleas is not limited to 1,000 dollars. The same statute, it will be observed, which gives the Circuit Court exclusive jurisdiction where title to real estate is in issue, also gives it where 1,000 dollars or upwards is involved. These cases can be upheld only on the principle that the several provisions of the statute are to be construed together, so as to give effect to each as far as possible. This seems to be the settled construction. This construction of the statutory provisions, leaves the Common Pleas Court invested with jurisdiction in suits against heirs, where the title to real estate is in issue, as well as in suits for partition, or in suits against administrators where more than 1,000 dollars is involved. This view is fully sustained by the case of *Fleece v. The Indiana, &c., Railroad Co.*, 8 Ind. R. 460, which was a suit against an administrator to recover more than 1,000 dollars. The Court say, that "the actions contemplated in §§ 11 and 12 of the Common Pleas act, and in § 5 of the Circuit Court act, are different from those specified in § 4 of the Common Pleas act, and the provisions in the statute touching the former class, do not necessarily affect the latter."

The jurisdiction of the Common Pleas, as conferred by § 4 above mentioned, and by § 5, upon which the case at bar depends, stands upon the same basis; and the case above cited is conclusively in point.

Perhaps it may be deduced from the statutes that it was

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the intention of the legislature, by §§ 4 and 5 of the Common Pleas act, to confer upon that Court what they deemed to be legitimate probate jurisdiction, and that such jurisdiction should be unqualified and unlimited; and that §§ 11 and 12, conferring a new and independent jurisdiction, should not extend to the amount of 1,000 dollars, or the investigation of titles to real estate.

9. "The value of the land in controversy was 1,000 dollars, and, therefore, the Court have no jurisdiction."

What we have said in reference to the preceding assignment of error, sufficiently disposes of this.

10. "The Court erred in rendering a judgment that the deeds destroyed were deeds in fee; for the complaint does not claim them to have been such, nor does the jury find what kind of deeds they were."

We do not discover that the defendants made any objection in the Court below, to the judgment, in respect to the matter embraced in this assignment of error. But passing over the want of objection below, we see no error in this respect. The complaint, to be sure, does not, in terms, allege the deeds to have been in fee. It is alleged that the parties sold and conveyed the land by deed, without qualification. This we think imports, plainly, conveyances in fee. Either in common or legal parlance, at least in this country, where the fee simple of land passes freely from hand to hand like an article of commerce, and where the fee is ordinarily conveyed, when a deed or conveyance is spoken of, a conveyance of the fee is understood, unless it be expressed or intimated that a less estate is granted. The verdict finds generally for the plaintiff, and that the matters alleged in his complaint are true.

We have thus examined the several errors assigned, and find none which we think should reverse the judgment.

*Per Curiam.*—The judgment is affirmed with costs.

*A. Ellison*, for the appellants.

*J. B. Howe*, for the appellees.

(1) *Good v. Zercher*, 12 Stanton (Ohio), 364.

ROUND, Executor v. THE STATE on the relation of RILEY  
and Others.

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An affidavit in support of a motion to set aside a default, is no part of the record unless made so by a bill of exceptions.

The Supreme Court will not decide whether the reasons for a motion to set aside a default are a part of the record, unless it appear whether the motion was overruled because they were deemed insufficient in law, or not true in fact.

If such reasons be deemed a part of the record, and held sufficient in law, yet it will be presumed, in favor of the Court below, the contrary not appearing, that they were not shown to be true in fact.

It was not meant, in the language used in *Spencer v. Russell*, 9 Ind. R. 157, to decide that the grounds of the decision of the Court upon the motion in that case might have been made sufficiently to appear by filing the motion and the reasons for it in writing; but only to decide that if the motion and the grounds of it had been so filed, exception to the overruling of it might have been taken in the same manner as to a ruling on demurrer.

If, in a suit against an executor, upon a claim against a decedent's estate, the record recites that the claim was duly entered on the appearance-docket, &c., ten days prior to the first day of the term, the defendant will be held to have had sufficient notice.

If the record show an entry to have been made "to the satisfaction of the Court," the Supreme Court will presume, the entry not being before it, that it was properly made.

APPEAL from the *Ripley* Court of Common Pleas.

Tuesday,  
June 12.

WORDEN, J.—On the 14th of *January*, 1859, the state upon the relation of *George A. Baily*, *Robert S. Baily*, and *Francis Baily*, by *Wm. S. Holman*, their next friend, they being minor heirs of *John J. Baily*, deceased, filed her complaint in the office of the clerk of the *Ripley* Court of Common Pleas against *Round* as executor of *Diah Pratt*, deceased, whose estate was being settled in that Court.

The complaint sets up a claim in favor of the relators against the estate of *Pratt*, upon a bond entered into by him in his lifetime, as the surety of one *Robert S. Baily*, administrator of the estate of *John J. Baily*, deceased.

Afterwards, on the fifth day of the *April* term of the Court for the same year, the executor failing to appear upon being called, "and it appearing to the satisfaction of the Court," as the record recites, "that said claim was duly

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ROUND  
v.  
THE STATE.

filed in the clerk's office of this Court, and entered on the appearance-docket of claims against decedents' estates, ten days prior to the first day of the *January* term, 1859, of this Court; and that said claim not being admitted by said executor, and he having also failed to refuse to admit said claim at said *January* term, the same was duly entered and docketed on the issue-docket of this Court for the present term thereof, and is duly pending for trial," &c.

The cause was submitted to the Court for trial, and upon hearing the evidence, the Court found for the plaintiff, for the use of the relators, the sum of 3,280 dollars, and rendered judgment accordingly.

Afterwards, on the eighth day of the same term, *Round*, the executor, appeared and moved to set aside the default and judgment; but no reasons appear to have been then filed, and the motion was continued until the next term. At the next term, the motion was renewed and reasons filed, but the motion was overruled, and exception taken. In the transcript are set out the reasons upon which the motion was based, as are also affidavits in support thereof, but there is no bill of exceptions properly in the record, and we think it clear that the affidavits are no part of the record without being made such by bill of exceptions. 2 R. S. p. 159, § 559.—*Kirby v. Cannon*, 9 Ind. R. 371.—Ind. Dig. p. 692, § 497.

Whether the reasons filed for the motion are part of the record, we need not determine, as it does not appear whether the motion was overruled because they were deemed insufficient in point of law, or not true in point of fact. If the reasons filed be deemed a part of the record, and if they be deemed sufficient in point of law to require the judgment to be set aside, yet we must presume, in favor of the ruling below, the contrary not appearing, that they were not shown to be true in point of fact. Admitting that the exception to the ruling might be taken without a bill of exceptions, by causing the exception to be noted on the record, still the ground of the ruling not being shown either by the record or by bill of exceptions, it must be presumed to have been correct.

In *Spencer v. Russell*, 9 Ind. R. 157, it was said that "perhaps if the defendant had filed his motion (in reference to costs) in writing, stating the grounds of it, and the Court had overruled it, the case might have been brought within 2 R. S. p. 116, § 345. It would have stood, in that event, like the decision of the Court upon a demurrer." The Court were speaking of the manner in which the exception itself may be taken, that is, the motion and the grounds of it being filed in writing, exception to the ruling upon it may be taken in the same manner as an exception to a ruling on demurrer, by noting the exception on the record. But it was not meant, by the language employed, to decide that the grounds of the decision of the Court on the motion would thus be made sufficiently to appear. The reasons for the motion would not necessarily be taken as true, like a pleading to which a demurrer is filed. The Court might overrule the motion, either because the grounds of it were deemed insufficient, or because the grounds stated were not made out in point of fact. We see no error in overruling the motion.

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V.  
THE STATE.

It is also claimed that the record does not sufficiently show that the Court had jurisdiction over the defendant, and that the proceedings were, therefore, unauthorized. We are of opinion that the record shows enough in this respect. It recites that "the claim was duly entered on the appearance-docket," &c., "ten days prior to the first day of the *January* term, 1859, of the Court," &c. This was sufficient notice to the defendant, and the subsequent proceedings seem to have been in accordance with the statute. Acts of 1855, p. 81.

A question is made as to the sufficiency of the entry on the appearance-docket, but that entry is not before us, except as it appears in the motion and affidavits, and what we have said already sufficiently disposes of them. We must presume, from the statement in the record, that it was duly entered, as that fact is shown to have appeared to the "satisfaction of the Court."

We find no error in the ruling below, hence the judgment must be affirmed.

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1860.

WHITE  
v.  
WILEY.

*Per Curiam.*—The judgment is affirmed with costs, to be levied of the goods of the testator.

*A. C. Downey* and *H. A. Downey*, for the appellant.  
*W. S. Holman*, for the state.

### WHITE v. WILEY.

*A.* deposited with *B.*, a justice of the peace, certain claims for collection, and took a receipt therefor, *June 22, 1855*. Afterwards *B.* collected 65 dollars on the claims. *A.* transferred the receipt, by indorsement in writing, to *C.*, *February 14, 1856*, of which the justice had notice in that or the ensuing month. *C.* demanded the 65 dollars, *April 2, 1856*. Payment refused. In the spring of 1855, *A.* held, as assignee, a note for 80 dollars which, for a full consideration, he assigned to *D.* who assigned it to *E.* In the summer of 1855, *A.* arranged by parol that *D.* should receive from the justice, as much of the proceeds of the claims as would pay him for the consideration of the assignment of the note by *A.*, and in *March, 1856*, the justice paid him the 65 dollars collected, and *D.* paid it to *E.* The assignee of the receipt, *C.*, sued the justice for the refusal to pay the 65 dollars to him. *Held*, that the indorsement on the receipt amounted to no more than an equitable assignment of the claims, or the judgments when recovered, and the instrument not being assignable by statute, the assignee took no greater interest than would have passed by mere delivery, without indorsement; that, hence, the transaction was, in effect, but a parol, equitable assignment, to which even the delivery of the receipt was not essential; that the arrangement previously made with *D.* by which he received the money collected, was also a parol equitable assignment, to the amount designated, differing from the one subsequently made to *C.* only in the non-essential point of the delivery of the receipt; that the assignment to *D.* being prior in point of time, he was entitled to be first paid, notwithstanding the fact that the subsequent assignee first notified the justice of his assignment.

Tuesday,  
June 12.

APPEAL from the *Wayne* Court of Common Pleas.

HANNA, J.—*Wiley* sued *White* before a justice, for failing to pay over money, upon demand, collected as a justice of the peace.

Answer—

That all moneys collected had been paid, &c.

Trial, judgment for plaintiff for 65 dollars, and the same result in the Common Pleas on appeal.

There is no question made as to parties.

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1860.

WHITE  
v.  
WILEY.

The facts shown by the plaintiff are, substantially, that one *Henderson* deposited with *White* certain claims for collection, and took a receipt therefor, on the 22d of *June*, 1855. At sometime thereafter, not shown by the record, *White* collected 65 dollars on said claims. *Henderson*, by indorsement in writing, transferred the receipt of the justice to *Wiley*, the appellee, on the 14th of *February*, 1856, of which the justice had notice in *February* or *March*. *Wiley* demanded the 65 dollars on the 2d of *April*, 1856. Payment was refused. And by the defendant it was shown that in the spring of 1855 said *Henderson* held, as assignee of one *Bedford*, a note on *Thomas* for 80 dollars, and at that time, for a full consideration, assigned it to *William White*, who transferred it to *James C. White*. On the 22d of *June*, *Henderson* informed *James C. White* that the maker of the note was insolvent, and he would have to pay the same. In the fall of 1855, *Henderson* made some arrangement with the maker of the note by which it was satisfied. The bill of exceptions further states that in the summer or fall of 1855, an arrangement was made by which *William White* was to receive of his father, out of the moneys collected on the claims put in his hands, as justice, as much of the proceeds as would pay him, *William*, for the horse sold by him to *Henderson*; that the defendant, in *March*, 1856, paid *William* the sum of 65 dollars on his claim, and *William* afterwards paid it over to *James C. White*.

Upon these facts, and the instructions given and those refused, the question arises whether the payment by the justice, to *William White*, is a discharge of his liability for the 65 dollars collected and thus paid.

It is insisted by *White* that the arrangement by which a sum was to be paid to *William White* was an equitable parol assignment of that amount. By the other party this is denied; but it is urged that even if that is true, the record does not show any notice to the justice of that arrangement, prior to the notice given by the plaintiff of his rights.

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v.  
WILEY.

The indorsement on the receipt amounted to no more than an equitable assignment of the claims or judgments, if they were even reduced to judgments. *Burson v. Blair*, 12 Ind. R. 371. And as the instrument was not assignable by virtue of the statute, 1 R. S. p. 378, no greater right was vested in the assignee than if the receipt had been delivered to him without such indorsement. *Mewherter v. Price*, 11 Ind. R. 202. The effect of the transaction was, therefore, a parol equitable assignment of the moneys then in the hands, or that might come into the hands, of the justice, upon the claims of which the receipt, which was delivered, was, as between certain parties, evidence. It differed from the arrangement before that time made, as to a part of said claims, only in the fact that in the one case the receipt was delivered, and in the other it was not, to the assignee. The delivery of the receipt was not absolutely essential to perfect the equitable assignment, especially when such assignment was only of a part of the sum of the claims enumerated in such receipt.

We are of opinion, therefore, that each of the arrangements made by *Henderson*, in regard to the money collected by *White*, was an equitable assignment of his interest therein, to the amount designated, and that, as such assignment to *William White* was prior in point of time to that of the plaintiff, he was, so far as that point is concerned, entitled to be first paid, unless something subsequently intervened to change those rights. We do not think that the fact that the subsequent assignee first notified the justice of the assignment, is of itself sufficient to change the rights of the parties. It is true, that if the prior assignee had failed to bring his rights to the knowledge of the justice, before the payment of the money to the last assignee, he might, by his neglect, have rendered those rights of no avail. The position which the justice, as a public officer, occupies, was one of indifference as between the parties. His assent to the assignment was not requisite to make it valid in equity. His official duty was discharged when he had paid the sum for which he was accountable, to the person having the highest legal or



equitable right to receive it. This he was to determine when the time for payment arrived. We think, so far as the record shows, he determined the question correctly in this case.

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THORNBURGH  
v.  
THE NEW-  
CASTLE, &C.,  
RAILROAD CO.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*J. Perry and O. P. Morton*, for the appellant.

*W. A. Bickle*, for the appellee.

THORNBURGH v. THE PRESIDENT OF THE NEWCASTLE AND  
DANVILLE RAILROAD COMPANY.

Suit upon a subscription of stock. Answer, 1. Fraud in this, that the soliciting agent represented that in the book he produced there were articles of agreement by which the subscriber might pay for stock in money or in ties for the road at the rate of, &c., and the defendant relying, &c., subscribed without reading, &c., and that said representations were false. 2. That a verbal entire contract was made, a part only of which was reduced to writing; that it was agreed the defendant should subscribe two shares, and might pay the same in ties at the rate of, &c., on demand, and the part reduced to writing is that stated in the complaint, and the other part defendant demands to prove by parol. The latter was for the payment of money absolutely, upon call. *Held*, 1. That the representations were not peculiarly within the knowledge of the plaintiffs, nor such as the defendant might rely upon. 2. That the demand to make parol proof was, in effect, a demand to contradict or vary a written instrument by proof of a verbal contemporaneous agreement, which cannot be done.

Upon the introduction of a record in evidence, it is usually read to the jury by the witness having it in charge, or by an attorney in the cause. It need not be handed to each juror, unless inspection for a particular purpose is necessary.

It cannot be proved collaterally that a railroad company has not expended 5 per cent. within three years, as required by the statute.

APPEAL from the *Hamilton* Court of Common Pleas. *Tuesday, June 12.*

HANNA, J.—Suit on a subscription to the capital stock of the company.

Answer—

1. A denial.

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CASTLE, &C.,  
RAILROAD CO.

2. Fraud in obtaining a subscription, in this, that the soliciting agent represented that in the book he produced there were articles of agreement by which the subscriber might pay for stock in money or in ties for the road at the rate of 25 dollars per annum; that defendant relying, &c., subscribed without reading, &c., and that the said representations were false and fraudulent, &c.

3. That a verbal entire contract was made, &c., a part only of which was reduced to writing; that it was agreed the defendant should subscribe two shares, and might pay the same in railroad ties at the rate of 25 dollars per year, on demand, and the part reduced to writing is that mentioned in the complaint, and the other part the defendant demands to prove by parol, &c.

A demurrer was sustained to the second and third paragraphs of the answer.

Trial by the Court; judgment for the plaintiffs.

The subscription was on the condition that no assessment, except 1 per cent., was to be made until the 600,000 dollars were subscribed.

On the trial, one *McFerly* was a witness, who (the bill of exceptions states) introduced the stock-book of said company in evidence, and swore that the same was the record-book of the company, and stated, verbally, without reading the same or handing the same to the Court for inspection, that said book showed that the stock of the company amounted to over 1,000,000 dollars, &c.

It is insisted that the demurrer was improperly sustained, and that the Court erred in the admission and rejection of evidence.

The defendant offered to introduce evidence to show that the company had not expended 5 per cent. within three years as required by the statute, &c.

The refusal to hear this testimony, is the the ruling complaint of in that behalf.

As to the second paragraph of the answer, it does not set up such representations as were peculiarly within the knowledge of the plaintiffs or their agents, nor such as the defendant had a right to rest and rely upon.

As to the third, that part of the agreement which it admits was properly reduced to writing, was for the payment of money absolutely, upon calls to be made. That part which it states was not reduced to writing, was for the payment in articles other than money, and at times and installments different from those therein provided for. The demand to be permitted to make such proof by parol, was, in effect, a demand to contradict the written instrument, or at least to vary it, by the proof of a contemporaneous verbal agreement. This could not be done. 1 Greenl. Ev. § 275. This case does not fall within the exception to the rule. *Id.* § 284 a.

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CASTLE, &C.,  
RAILROAD CO.

The demurrer was, therefore, properly sustained.

The proof made, as to the amount of the stock subscribed, does not fall within the objection that it was the admission of parol evidence of that which should have been proved by the record. Upon the introduction of a record, it is usually read to the jury by the witness who may have it in charge, or by some attorney who may be engaged in the cause. It is not often, nor is it necessary, in ordinary cases, that it should be handed to each juror, unless in cases when inspection for a particular purpose is necessary. Here it was introduced in evidence. The aggregates, or footings, were stated. The record was there for the inspection of the attorneys, parties, and Court. The witness, in effect, read those aggregates by stating that the book showed certain things.

The testimony offered was properly rejected. Such testimony would have been, perhaps, admissible on a direct proceeding against the company, but not collaterally.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*D. C. Chipman*, for the appellant.

*J. N. Evans*, for the appellees.

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MILLER  
v.  
KEEGAN.

MILLER and Others v. KEEGAN and Others.

14	508
133	394
14	502
143	259
14	502
146	239
14	502
171	384

Item in a will as follows: "My will and desire is that the farm on which I now live, together with the water grist mill, be rented out and the rents applied to the support and education of my three youngest children, viz., *Isaac*, *Hiram*, and *William M. Miller*, and to the support of my wife, *Anna Miller*, and to keep the said farm and mill in repair, until my son *Isaac* shall attain the age of twenty-one years. At that time, if they see cause, the mill and land to be sold, and the proceeds thereof equally divided by the said *Isaac*, *Hiram*, and *William M. Miller* (my wife, however, reserving to herself her right of dower in said premises during her natural life, and at her death to revert to the said *Isaac*, *Hiram*, and *William*); but should either die before that time, the whole to descend to the survivor; and should there be any overplus remaining out of the rent, it shall be put out at interest for the benefit of the children." *William M.* died during the minority of *Isaac*, *Hiram* being yet alive; but afterwards *Hiram* died intestate without issue, leaving a widow. After the death of *William M.*, but before that of *Hiram*, *Isaac* conveyed his undivided half of the property derived from the will, to one *Cox*.

- Held*, 1. That upon the death of *William M.*, if not at the death of the testator, the home farm and mill vested in *Isaac* and *Hiram*, subject to the widow's right of dower.
2. But if the property did not vest till the majority of *Isaac*, he and *Hiram* then became tenants in common of it.
3. That where in the construction of such a clause in a will, there is a doubt as to which point of time it was intended the estate should vest, the earliest will be taken as being the most equitable to the heirs of all the devisees.
4. That *Isaac* inherited nothing from *Hiram*.
5. That a party claiming under *Cox* could recover to the extent of his interest as grantee of *Isaac*.

Tuesday,  
June 12.

APPEAL from the *Warrick* Circuit Court.

PERKINS, J.—*Philip Henry Miller*, deceased, left a will reading as follows:

"I, *Philip Henry Miller*, of *Campbell* township, *Warrick* county, and state of *Indiana*, being poorly in health, but of sound mind and memory (thanks be to Almighty God for his mercies), do make and declare this to be my last will and testament, revoking all other wills that may have been by me made at any previous date.

"*Item*. I bequeath my soul to God who gave it, and my body to the dust, in hopes of a joyful resurrection at the last day.

"*Item.* My will and desire is that all my personal property, except such as is hereinafter otherwise bequeathed, be sold at public auction immediately after my decease, and the proceeds thereof applied to the payment of my just debts and funeral expenses; and after these expenses are duly paid, the balance, if any, together with the amount of all notes and book accounts due me, to be equally divided between my children, viz., *John Miller, Benjamin H. Miller, Hiram Miller, Isaac Miller, and William M. Miller*, each to receive his part at the age of twenty-one years.

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1860.

MILLER  
v.  
KEEGAN.

"*Item.* I give and bequeath to my beloved wife, *Anna Miller*, one feather-bed [and divers other articles of personal property].

"*Item.* I give and bequeath to my son, *Benjamin H. Miller*, a sorrel filly now claimed by him.

"*Item.* I give and bequeath to my son, *Isaac Miller*, a blaze-faced sorrel filly.

"*Item.* I give my son, *Benjamin Miller*, my rifle.

"*Item.* My will and desire is that the farm on which I now live, together with the water grist mill, be rented out, and the rents applied to the support and education of my three youngest children, viz., *Isaac, Hiram, and William M. Miller*, and to the support of my wife, *Anna Miller*, and to keep the said farm and mill in repair, until my son *Isaac* shall attain the age of twenty-one years. At that time, if they see cause, the mill and land to be sold, and the proceeds thereof equally divided by the said *Isaac, Hiram, and William M. Miller* (my wife, however, reserving to herself her right of dower in said premises during her natural life, and at her death to revert to the said *Isaac, Hiram, and William*); but should either die before that time, the whole to descend to the survivor; and should there be any overplus remaining out of the rent, it shall be put out on interest for the benefit of the children."

Further items give certain farms to his other sons, and name his executors.

The will was duly proved, its validity is not disputed, and the only question raised is upon the construction of the last item above set out.

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*William M. Miller* departed this life before *Isaac Miller* attained the age of twenty-one years. *Hiram* was alive at that time. And, under the will, at that time, if not at the death of the testator, we have no doubt, the home farm and grist mill devised to *Isaac*, *Hiram*, and *William M.*, and the survivor of them, vested in *Isaac* and *Hiram*, subject to the widow's right of dower. If the property did not vest till the coming of age of *Isaac*, then, at that time, *Isaac* and *Hiram* were tenants in common of it.

The clause commencing "my wife, however," we regard as parenthetical, and have marked it accordingly; but the concluding clause, commencing "and should there be any overplus," shows clearly that the point of time then in the mind of the testator was at least as early as that of the coming of age of his son *Isaac*. See *Moore v. Lyons*, 25 Wend. 119, and cases collected there.

And where, in the construction of such a clause of a will, there is a doubt as to which point of time it was intended the estate should vest, the earliest will be taken as being the most equitable to the heirs of all the devisees. See 4 Kent, 203, note; *Id.*, 205, 206; 2 W'ms on Ex., 798; *Doe v. Prigg*, 8 B. and C. 231.

In 1856, *Hiram* deceased without issue and intestate, but leaving a widow, his mother, and his brother, *Isaac*.

But in 1842, after the death of *William M.*, *Isaac Miller* conveyed his undivided half of the property derived from the will, to one *John A. Cox*, and he inherited nothing from his brother *Hiram*. 1 R. S. p. 251, § 25.

The plaintiffs claim title through *Cox*, the grantee of *Isaac Miller*, and should have recovered to the extent of their interest in the land.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*C. Baker* and *J. W. Foster*, for the appellants (1).

*L. Q. DeBruler*, for the appellees.

(1) Mr. *Baker*, in argument, construed the item as follows:

According to my construction of the will, the testator intended to make the following provisions, to-wit:

1. That the farm and mill should be rented out, and the rents applied to

keeping the premises in repair, and to the support of his widow, and to the support and education of his sons *Isaac*, *Hiram*, and *William*, until *Isaac* attained the age of twenty-one years.

2. At the majority of *Isaac*, the three sons might, in their option, sell the land, subject to their mother's right of dower, and divide the proceeds equally between them.

3. Should any or either of the sons die, before the death of the mother (and the land then remain unsold), the interest of the son or sons so dying, should go to the surviving brother or brothers.

After giving the three brothers the option of selling at the majority of *Isaac*, this language is used: "And the proceeds thereof to be equally divided by the said named *Isaac*, *Hiram*, and *William*; my wife, however, reserving to herself her right of dower on said premises during her natural life, and at her decease, to revert to the said *Isaac*, *Hiram*, and *William M. Miller*; but should either die before that time, the whole to descend to the survivor." We insist that the words "before that time," refer to the last event before mentioned, to-wit, the death of the wife. Such I think was the intention of the testator, and such is the grammatical construction of the language.

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HOUGHTON  
v.  
HOUGHTON.

## HOUGHTON v. HOUGHTON, Administrator.

Suit by a widow against the administrator to recover 300 dollars, under § 21 of the act regulating descents. Answer, that the plaintiff, prior to her marriage with the decedent, was a widow, and had children by a former husband, and was possessed of property, real and personal, acquired by her former marriage, and the decedent was a widower having children by a former marriage, and also property acquired by such former marriage; that before their marriage, and in view of the same, in order that their contemplated marriage might not effect any change in their respective rights to the property, and that the same might descend to the children of each, as though no marriage had taken place, it was verbally agreed that the decedent should pay to the plaintiff, during coverture, one-third of the net profits of his lands for her use, independent of his control, and claim no right to the use or control of her separate property during coverture, or afterwards, but let it all go to her children by her former marriage, if not otherwise disposed of by her; and in consideration of the foregoing, the plaintiff relinquished all claim to any portion whatever of her said intended husband's estate after his death, but agreed that it should all go to his children by a former marriage, if not otherwise disposed of by him.

*Held*, 1. That this agreement may be regarded as fully executed by both parties.

2. That it was liberal to the wife, and not void for being by parol.

3. That it might have been valid if made during coverture.

14	505
125	505

14	505
149	150
151	208

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v.  
HOUGHTON.

4. That it was not void by the statute of limitations, because not to be performed within a year.
5. That it was always competent for the husband, by an antenuptial contract, to purchase his wife's personal fortune; and consequently he may buy her interest in his own.
6. Antenuptial contracts to be executed after the marriage has been determined, are not destroyed by the marriage.

Tuesday,  
June 12.

APPEAL from the *Marshall* Court of Common Pleas.

PERKINS, J.—*Susannah Houghton*, the widow of *James Houghton*, deceased, brought her action in the Court below against the appellant, administrator of said decedent, to recover 300 dollars, which she claimed under the provisions of § 21 of the "Act regulating descents and the apportionment of estates," 1 R. S. p. 251.

The defense set up was, in substance, that said *Susannah*, prior to her marriage with the decedent, was a widow, and had children by a former husband, and was possessed of property, real and personal, acquired by her former marriage, and the decedent was a widower having children by a former marriage, and also property acquired by such former marriage; that before their marriage, and in view of the same, in order that their contemplated marriage might not effect any change in their respective rights to the property, and that the same might descend to the children of each, as though no marriage had taken place, it was verbally agreed that the decedent should pay to said *Susannah*, during coverture, one-third of the net profits of his lands for her use, independent of his control, and claim no right to the use or control of her separate property during coverture, or afterwards, but let it all go to her children by her former marriage, if not otherwise disposed of by her; and, in consideration of the foregoing, said *Susannah* relinquished all claim to any portion whatever of her said intended husband's estate after his death, but agreed that it should all go to his children by a former marriage, if not otherwise disposed of by him.

This agreement was held invalid by the Court below.

The agreement was fully executed on the part of the deceased husband, so that the consideration for the agree-



ment of relinquishment on the part of the wife was fully paid and received; and, inasmuch as the property in which she relinquished her right was in the possession of the husband, and then in his representative after his death, no act was required to be done on the part of the wife or widow in further execution of the agreement on her part; and it seems that the agreement may, therefore, be regarded as one fully executed by both parties. This would appear to be manifest from the fact that the widow is now, in violation of her agreement, in violation of equity and good faith, invoking the aid of a Court to enable her to prevent the execution on her part from becoming operative. The agreement was extremely liberal to the wife, and was not void for being by parol. *Barnett v. Goings*, 8 Blackf. 284.—*Resor v. Resor*, 9 Ind. R. 347.—*Livingston v. Livingston*, 2 Johns. Ch. 537.—*Malin v. Coult*, 4 Ind. R. 535. See 2 Bright's Husband and Wife, p. 90, *et seq.*

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HOUGHTON  
v.  
HOUGHTON.

The foregoing cases show that the contract might have been valid, even if it had been made during coverture. It was affirmed and executed during that relation.

It is claimed that the contract was void because not to be performed within one year.

It seems that contracts, as a general proposition, are not, by part performance, taken out of the operation of that clause of the statute making contracts incapable of enforcement by suit where they are not to be performed within a year. See note to *Fenton v. Emblers*, in 1 Wm. Blacks. R. (2d ed.), p. 354; Walk. Am. Law, p. 423. But, in this case, we have seen, performance probably took place. And as to the application of the rule to contracts concerning marriage, and the rights and liabilities incident, see *Jenkins v. Eldridge*, 3 Story's R. 184. But if performance was not shown to have taken place, still, according to the case of *Wiggins v. Keizer*, 6 Ind. R. 252, the contract was not one of which the performance necessarily extended beyond a year, so that it was not within the statute.

It may properly be noticed here that this suit involves only personal estate; and it may be laid down as undoubted law, that it was always competent for the hus-

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1860.

band, by an antenuptial contract, to purchase his wife's personal fortune. Bright, *supra*.

GLIDEWELL  
v.  
RUDISILL.

It may be further observed that the statute only applies to cases where the contract is not to be performed by either party to it within a year. Smith on Cont. (Rawle's ed.), side page 140.

If he could buy hers, it would surely be competent for him to buy out her interest in his own.

Antenuptial contracts, to be executed after the marriage has been determined, are not destroyed by the marriage. 1 Shars. Blacks. Comm., p. 442, note 28.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. Bradley*, for the appellant.

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GLIDEWELL v. RUDISILL.

Tuesday,  
June 12.

APPEAL from the *Putnam* Circuit Court.

*Per Curiam*.—Suit by the appellee against the appellant upon a note, before a justice of the peace. Appeal to the Circuit Court. Trial by the Court; finding and judgment for the plaintiff.

No exception is taken to any ruling; no motion was made for a new trial, nor is any question presented for our decision.

The judgment is affirmed with 10 per cent. damages and costs.

*W. W. Wick*, for the appellant.

*D. E. Williamson* and *A. Daggy*, for the appellee.

THE TOLEDO, WABASH, AND WESTERN RAILROAD COMPANY v. HIBBERT.

May Term,  
1860.

THE TOLEDO,  
&C., RAIL-  
ROAD CO.  
v.  
HIBBERT.

The statute of 1853, in relation to the liability of railroad companies whose roads are not fenced, for killing stock, does not apply to actions commenced in Courts of Common Pleas and Circuit Courts.

APPEAL from the *Huntington* Court of Common Pleas. *Wednesday, June 13.*

HANNA, J.—This was a suit against the company for the value of certain hogs and cattle destroyed by the rolling stock of the company. The first and third paragraphs of the complaint are founded upon the statute of *March*, 1853. The second, avers carelessness, &c., but is confined to the killing of cattle at the crossing of a highway.

The answer, in several paragraphs, in substance, averred that due care and caution were used by the company, but that in consequence of the negligence of the defendant, the injury occurred.

In reply a general denial was filed.

The evidence tended to show the destruction of four hogs, worth 12 dollars, some half a mile from the crossing of the highway, and the killing of four and injury of two head of cattle at the crossing. The road was not fenced. The evidence was contradictory as to whether due care had been exercised by the servants of the company.

The instructions given assumed, and those refused denied, that the case was governed by the act of *March*, 1853.

The verdict was for the plaintiffs, and was for such sum that we are not able to determine certainly whether the value of the hogs was included in it or not. If it was, and we see nothing in the evidence and instructions as given to preclude the jury from so including it, then the case will have to be reversed.

We have heretofore decided that the act of *March*, 1853, does not apply to cases commenced in the Common Pleas and Circuit Courts. (1)

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1860.

HAINES  
v.  
KENT.

The instruction that, because the road was not fenced, the company were liable, whether guilty of negligence or not, was, therefore, erroneous.

Under this view of the case, it is not necessary for us to decide whether the want of an averment of carelessness, &c., in the first and third paragraphs of the complaint was cured by the subsequent pleadings.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*W. Z. Stuart*, for the appellants.

*L. P. Milligan*, for the appellee.

(1) *The Evansville, &c., Co. v. Ross*, 12 Ind. R. 446. The act of 1859 extended the remedy so as to enable a party to bring his action in either of those Courts.

### HAINES v. KENT and Another.

Wednesday,  
June 13.

APPEAL from the *Warren* Court of Common Pleas.

*Per Curiam.*—*Haines* sued the appellees for money deposited.

Answer—

1. A denial.

2. Admitting that the money was left with *Kent* as an individual, averring that it was by him paid to *Ellsworth* for plaintiff, and denying a deposit of said money, &c.

3. Admitting that the money was left with *Kent*, and averring that plaintiff was indebted to defendants, and that the money was applied on such indebtedness, &c.

Reply in denial.

Trial, verdict and judgment for the defendants.

There were several special findings upon points submitted to the jury. The plaintiff moved that a judgment be rendered in his favor on those special findings, notwithstanding the general verdict. The motion was overruled.

Those findings were, in substance, that no money was deposited with the defendants, nor with *Kent*, but that it was left with *Kent* without directions as to its application; that no directions were given to pay it to *Ellsworth*, nor to apply it on any debt due *Kent* or *Kent* and *Hitchens*. The evidence shows that *Kent* was the agent of *Ellsworth* for the sale of certain lands and receipt of the price, &c. It also tends to show that *Haines* was indebted to *Ellsworth* for lands purchased by another person, but which had passed into his hands, and through him into the hands of *Kent*; and that *Kent*, after the money was so left with him, had paid on that debt, to *Ellsworth* for *Haines*, a greater sum than the amount so placed with him. Questions are raised upon instructions given and refused as to the right of *Kent* to pay *Ellsworth* without positive instructions to that effect from *Haines*.

May Term,  
1860.

CLEVELAND  
v.  
ROBERTS.

Under these circumstances we do not see any error in the rulings of the Court complained of by the appellant.

The judgment is affirmed with costs.

*R. A. Chandler*, for the appellant.

*B. F. Gregory* and *J. Harper*, for the appellees.

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CLEVELAND v. ROBERTS.

14 511  
139 287

A complaint on a promissory note averring the loss of the note, with an affidavit of its loss and contents, is sufficient without a copy of the note.

Where the trial, in such case, was by the Court, *held* that the affidavit was *prima facie* sufficient evidence of the loss of the note; and that, with the testimony of a witness to the contents, would support a finding for the plaintiff.

Where the proof varies from the averment, the pleading, being amendable below, will be considered as amended in the Supreme Court.

APPEAL from the *Hendricks* Court of Common Pleas. *Wednesday, June 13.*

HANNA, J.—*Roberts* made his affidavit of the loss of a promissory note therein described as having been executed by *Cleveland* to one *Harris*, and stating the date and

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1860.

CLEVELAND  
v.  
ROBERTS.

amount, &c., of said note; and that the same was transferred and delivered to him without indorsement in writing.

Suit was brought against *Cleveland* as maker, and *Harris* to answer as to his interest in said note. *Harris* made default, and the suit, as to him, was dismissed. *Cleveland* demurred. His demurrer was overruled. This raises the first point.

It is insisted that the statute, 2 R. S. p. 44, is imperative, and requires the note or a copy to be filed with the complaint; and as it was not done here, that the demurrer should, therefore, have been sustained.

A sufficient excuse for not filing it, is averred in the complaint, and shown in the affidavit filed.

The next objection taken is, that the evidence was not sufficient to sustain the finding against the defendant. Among other answers was a denial. The case was tried by the Court without a jury.

The bill of exceptions, which professes to contain all the evidence, does not show that the affidavit, or any other evidence of the loss of the note, was produced on the trial; and does show that *Harris*, the only witness who testified, stated that he assigned the note in writing to the plaintiff.

Was the evidence sufficient?

As the affidavit was filed with the pleading, and the trial by the Court, we think it could be properly considered by the Court, and was, *prima facie*, sufficient evidence of the loss of the note. The contents were proved by the witness. The proof as to the assignment, varied from the averment upon that point. The averment could have been amended to meet the proof in the Court below, and will, under the statute, be considered here as amended.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*C. C. Nave* and *J. Witherow*, for the appellant.

*H. C. Newcomb* and *J. S. Tarkington*, for the appellee.

## SMITH and Others v. CONLAN.

May Term,  
1860.SMITH  
v.  
CONLAN.

If an appellee join in error, and then add a paragraph alleging that the appeal was not taken within three years, &c., he waives his joinder.

And it seems, that if the appellant submit the case, without a reply to such answer, he admits its truth.

APPEAL from the *Laporte* Circuit Court.

Wednesday,  
June 13.

HANNA, J.—To the assignment of errors in this case, the appellee answered, first, in the form of a joinder in error; and, second, that the appeal was not taken within three years from the rendition of judgment, &c.

There was no reply to this answer.

Two points are made by the appellants upon this second answer—

1. That the appellee having joined in error, is concluded by that act from setting up the matter attempted to be pleaded in the second answer.

2. If not, then the appellee waived any benefit of said second answer, by not taking a rule against, and requiring a reply from, the appellants thereto.

We cannot concur in this view of the question of practice. The appellee waived the joinder in error by filing the second paragraph of the answer to the assignment of error. Ind. Dig., p. 649. The appellants having submitted the case without replying to or controverting the matters set up in the second paragraph of the answer, perhaps, admitted the truth thereof; but whether that was the effect or not, it appears, *prima facie*, to be the fact, from an inspection of the record and the indorsement thereon, of the time of filing, that the answer is true, that more than three years had elapsed. This Court, therefore, has no jurisdiction.

*Per Curiam*.—The appeal is dismissed with costs.

*L. Barbour* and *J. D. Howland*, for the appellants (1).

*J. A. Thornton* and *J. Bradley*, for the appellee.

(1) The following was the argument of counsel for the appellants on the points decided:

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1860.

LAMBDIN  
v.  
MILLER.

There is in this record a special assignment of errors, on behalf of the appellants, and a formal joinder in error on behalf of the appellee. Following immediately upon this joinder, the counsel for the appellee has written what purports to be a plea of the statute of limitations. This plea is merely written upon the transcript. Its filing is not indorsed. It is not noted upon the order-book of the Supreme Court. No rule was taken upon the appellants to reply. Under these circumstances the cause was submitted, and thus the record stands to abide the judgment of the Court.

We remark upon this state of the pleadings, that this Court has a system of practice which must be conformed to, and which, so far as the point in hand is concerned, is settled by the statute. In 2 R. S. p. 161, § 568, it is provided that, "No pleadings shall be required in the Supreme Court upon an appeal, but a specific assignment of all errors relied upon, to be entered upon the transcript in matters of law only, which shall be assigned on or before the first day of the term at which the cause stands for trial; and the appellee shall file his answer thereto."

Now, upon this statute the practice is perfectly plain, and, so far as we can learn, has never been doubted or misunderstood. In matters of law, no other pleading is required beyond the assignment of errors, which is to be entered upon the transcript. Following this construction, it has not been the practice to require a joinder in error; the special assignment in matters of law being the only pleading required; the mode of presenting which is particularly pointed out. But when the appellee relies upon matter of fact, he must answer; and his answer must be filed. That is, he must state his defense in writing; he must present it to the clerk that the filing may be indorsed upon the answer, and a proper entry may be made in the records of the Court; and he must take the proper steps to compel an issue upon that matter of fact. None of these things being done, we insist there is no answer properly before this Court.

But there is a further view of the subject to which we ask attention. The appellee having formally joined in error, is concluded by his own act. The denial of error in the record is a demurrer. It tenders an issue upon matters of law. It is not competent for the appellee, after joining in an issue of law, to tender an issue of fact. The pleadings thus presented are incongruous.

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LAMBDIN v. MILLER and Another.

Wednesday,  
June 13.

APPEAL from the *Orange* Court of Common Pleas.

*Per Curiam*.—This was an action by the appellant against the appellees for damages for flowing water upon his land. The amount claimed was 1,000 dollars. The Court had no jurisdiction (1).



The appeal is dismissed with costs.

*A. J. Simpson*, for the appellant.

*C. L. Dunham* and *H. Heffren*, for the appellees.

May Term,  
1860.

LYON  
v.  
PERRY.

(1) *Fleece v. The Ind., &c., Railroad Co.*, 8 Ind. R. 460; *Harvey v. Ferguson*, 10 id. 393; *Trew v. Gaskill*, id. 265; *The State v. Turner*, id. 411.

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LYON and Another v. PERRY and Another.

The record of a mortgage is, by statute, original evidence of the contents of the instrument.

If the complaint against a mortgagor and a purchaser from him, for foreclosure, fail to allege that the mortgage was recorded and that the purchaser had notice, the proof of these facts without objection cures the defect.

APPEAL from the *Grant* Circuit Court.

Wednesday,  
June 13.

*Per Curiam*.—Suit to foreclose a mortgage. The mortgaged premises had been purchased by another of the mortgagor, and the purchaser was made a party defendant with the mortgagor.

The complaint did not allege that the mortgage had been recorded, nor that the purchaser bought with notice. But these facts were proved without objection on the trial, and the Court found, therefore, that the mortgage was valid against the purchaser.

It was objected on the trial that the original mortgage, instead of the recorded copy, should be introduced to prove the contents of the mortgage, but there was no objection to the giving in of the record to show the fact of the mortgage being recorded, and, hence, notice to the purchaser.

The record is made by statute original evidence of the contents of the mortgage. 2 R. S. p. 92.

Under these circumstances, we think it appears to us that the case has been fairly decided on its merits, and that the judgment must be affirmed. 2 R. S. pp. 123, 162, §§ 382, 580.

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1860.

McNAMARA  
v.  
ELLIS.

The judgment is affirmed with 1 per cent. damages and costs.

*A. Steele* and *H. D. Thompson*, for the appellants.  
*H. S. Kelley* and *R. T. St. John*, for the appellees.

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McNAMARA v. ELLIS.

14 51  
180 51

An affidavit for an attachment in the words as affiant "verily believes," is sufficient.

Where the defendant answered and filed interrogatories, and took a rule generally for a reply, and the plaintiff replied without answering the interrogatories: *Held*, that the cause could not be dismissed because the interrogatories were not answered.

Where the proceedings on an attachment do not show that the property was attached in the presence of, nor that it was appraised by, a householder, an order for its sale will be reversed.

Wednesday,  
June 13.

APPEAL from the *Floyd* Court of Common Pleas.

*Per Curiam*.—Suit upon a note commenced by attachment. The defendant appeared and moved to dismiss the attachment, because the affidavit was as the affiant "verily believed." The motion was overruled. The affidavit was sufficient. *Trew v. Gaskill*, 10 Ind. R. 265.

The defendant answered, and filed interrogatories, and took a rule generally for a reply. Perhaps this did not amount to a rule to answer interrogatories.

The plaintiff replied to the answer, but did not answer the interrogatories. No steps were taken to compel an answer; but a motion was made to dismiss the cause, because the interrogatories were not answered. The motion was overruled. This was right. *Perk. Pr.*, 238. A case was not presented making it the absolute duty of the Court to dismiss under § 363, 2 R. S. p. 120.

The cause was submitted to the Court; judgment for the plaintiff on the note, and that the attached property be sold, &c.

The order to sell the attached property was erroneous,

because the proceedings on the attachment did not appear to be legal. It did not appear that the property was attached in presence of, nor that it was appraised by, a householder, as the statute requires. See *Willetts v. Ridgway*, 9 Ind. R. 367.

May Term,  
1860.

McDANIEL  
v.  
WEAVER.

The order for the sale of the property is reversed with costs. The judgment on the note is affirmed.

*J. H. Stotsenburg* and *T. M. Brown*, for the appellant.

*D. C. Anthony*, for the appellee.

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McDANIEL v. WEAVER.

APPEAL from the *Benton* Court of Common Pleas.

Wednesday,  
June 13.

PERKINS, J.—Suit to enforce a mechanic's lien, &c.

The complaint contained two paragraphs—

1. That plaintiff furnished the materials to a contractor; that the proprietor was owing the contractor, and that notice of lien was filed, &c.

2. An original promise to pay for the materials in consideration they should be furnished to the contractor.

Trial on the general denial. The evidence is not of record. There was a general judgment for the value of the materials simply, but not ordered to be specifically enforced.

This judgment might be right on the second paragraph.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*J. Benedict*, for the appellant.

*J. F. Parker*, for the appellee.

May Term,  
1860.

THORNTON v. WILLIAMS.

THORNTON  
v.  
WILLIAMS.

Suit on a note. Answer, a set-off. Reply, 1. A denial. 2. A settlement at the time the note was given. One item of the set-off was of a date later than the note.

*Held*, 1. That the date of an item of a set-off is not conclusive, even if it be *prima facie*, evidence of the time the item accrued.

2. That under the issues the defendant might prove all the items of his set-off, and the plaintiff would have to show that they were settled in the note; that if they all accrued before the date of the note, the note would be *prima facie* evidence of settlement; *aliter*, as to such as did not so accrue.

Judgment for plaintiff. New trial granted. The defendant asked leave to demur to the reply. *Held*, that this was matter in the discretion of the Court.

Wednesday,  
June 13.

APPEAL from the *Blackford* Court of Common Pleas.

PERKINS, J.—Suit upon a note. Answer by way of set-off.

Reply, 1. In denial of the set-off. 2. That it was settled at the time the note was given.

This is the substance of the second somewhat informal paragraph. One of the items of the set-off set up in the answer was dated later than the note. But the date was not conclusive, if even *prima facie*, evidence of the time the item accrued, if it accrued at all.

Under these issues, upon a trial, the defendant might prove all the items of his set-off, and the plaintiff would have to show that they were settled in the note. If they all accrued before the date of the note, the note would be *prima facie*, but not conclusive, evidence that they had been settled. As to such as did not so accrue, the note would not be *prima facie* evidence of settlement.

A trial was had, and the plaintiff had judgment. A new trial was granted. The defendant then asked leave to demur to the second paragraph of the reply. Leave was refused. This was matter in the discretion of the Court; and the discretion does not appear to have been abused. Perk. Pr., p. 234.

The cause was then retried upon the issues previously formed. Judgment for the plaintiff. There is no error.

*Per Curiam.*—The judgment is affirmed with 10 per cent. damages and costs. May Term,  
1860.

*W. March*, for the appellant.

*A. J. Neff*, for the appellee.

GREER  
v.  
STUDABA-  
KER.

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GREER v. STUDABAKER.

In a suit before a justice, a motion to reject the answer was overruled, and judgment rendered for the plaintiff. On appeal to the Circuit Court, the same motion was sustained. On appeal to this Court, the clerk copied the answer into the record, as a part of the justice's transcript; but there was no bill of exceptions embodying it. *Held*, that it was no part of the record.

APPEAL from the *Wells* Circuit Court.

*Wednesday,  
June 13.*

HANNA, J.—Suit by the appellee against the appellant, before a justice.

Answer filed, as appears by the transcript copied in the record, setting up a note given by the plaintiff for 200 dollars, and offering to set off a sum equal, &c., and adding judgment for costs, &c.

The plaintiff moved to reject the answer; motion overruled. Judgment for plaintiff.

On appeal in the Circuit Court, the record shows that the plaintiff moved to reject the answer of the defendant, which motion was sustained; and thereupon the plaintiff had judgment.

There is no bill of exceptions embodying the rejected answer. The only question attempted to be presented is upon that ruling. But, first, is the answer before us, so that we can consider it? If it had been originally filed in the Circuit Court, it would not be, under the circumstances, before us. *Adkins v. Hudson*, 11 Ind. R. 372. We do not think the fact that it was copied into the justice's transcript presents it to us in any more authentic form, after the motion was sustained, than if the clerk had voluntarily transcribed an original rejected paper into the record.

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1860.

This being the case, there is nothing before us for consideration.

EDWARDS  
v.  
FISHER.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*J. R. Coffroth*, for the appellant.

The names of counsel for the appellee are not legible.

### LASSELLE v. WILSON.

Wednesday,  
June 13.

APPEAL from the *Cass* Court of Common Pleas.

*Per Curiam.*—The judgment in this case is affirmed with 10 per cent. damages and costs. It is accurate in every particular to nearer than a hair's breadth.

The points made have all been ruled upon and settled in numerous cases (1).

*C. B. Lasselle*, for the appellant.

(1) The appellant relied upon two points—

1. The cause was tried upon an issue of fact raised by answer, though a demurrer to the complaint was pending undecided.

2. That the judgment was without relief, &c., under § 15, 1 R. S. p. 379, which, he contended, is unconstitutional.

### EDWARDS v. FISHER.

Wednesday,  
June 13.

APPEAL from the *Starke* Circuit Court.

*Per Curiam.*—Suit upon promissory notes. The notes did not waive appraisement laws. Judgment by default, to be collected without relief, &c. No motion was made below to set aside the default, and correct the judgment. That part of the judgment making it collectable without relief was wrong, but as no motion was made below to

correct the error, before appealing to this Court, the appeal must be dismissed.

The appeal is dismissed with costs.

*J. O'Brian*, for the appellant.

May Term,  
1860.

HAWKINS  
v.  
THE BOARD  
OF COMMISSIONERS, &c.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY  
v. WILLIAMS.

APPEAL from the *Shelby* Court of Common Pleas. *Wednesday,*

*June 13.*

*Per Curiam*.—This was an action for negligently and carelessly killing cattle of appellee, for which he had judgment. The evidence is in the record.

There was no proof of negligence; nor was there any allegation or proof as to whether the road was fenced (1).

The judgment is reversed with costs. Cause remanded, &c.

*J. S. Scobey*, for the appellants.

*E. H. Davis*, *C. Wright*, and *J. C. Green*, for the appellee.

(1) The point was made in the argument of this case, on the part of the appellants, that the cause was decided over an issue of law undisposed of; and *Beard v. Adams*, 8 Blackf. 469; *Barret v. Thompson*, 5 Ind. R. 457; and *Gray v. Cooper*, *id.* 506, were cited.

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HAWKINS and Others v. THE BOARD OF COMMISSIONERS  
OF THE COUNTY OF STARKE.

Complaint against a county board, alleging that a petition praying a change of the county boundary so as to include certain territory, supported by affidavits that the petitioners were residents of the territory in question, and a majority of the legal voters thereof, which petition and affidavits were made part of the complaint, had been rejected by the board, and the prayer there-

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1860.

HAWKINS  
v.  
THE BOARD  
OF COMMISSIONERS, &c.

Wednesday,  
June 13.

of refused, and that the board had refused to order the petition to be filed, and the application to be continued to the next term, and praying a writ of *mandamus*. The complaint was sworn to by two persons. On motion, a writ to show cause, &c., embodying the complaint, was issued, to which a demurrer was sustained. *Held*, that this was error; that the statute was substantially followed.

APPEAL from the *Starke* Court of Common Pleas.

HANNA, J.—At the *October* term of the Common Pleas Court the appellants filed their complaint, averring that the petition, which was made a part of their complaint, had been by them theretofore presented to the said appellees, to-wit, at the *September* term, 1857, of said board; and that said board rejected said petition and refused the prayer of said petitioners, and refused to perform their duty in respect to said petition, in this, that they refused to order said petition filed, and said application to be continued until the regular meeting of said board next thereafter, as it was their duty to do, &c.

The plaintiffs pray a writ of mandate to compel said commissioners to receive, file, and spread upon their records said petition, &c., to continue the same, &c., and to forward a copy to the secretary of state's office, &c.

The Complaint was sworn to by two persons, as was, also, the petition, made a part thereof.

The petition referred to was one praying that the boundary lines of the said county might be so changed as to include within the limits of said county, certain territory described as being within the boundaries of the county of *Jasper*, &c.

There is attached to said petition the affidavits of two persons that the persons whose names appear to the same are residents of said named territory, and constitute a majority of the legal voters thereof, &c.

Upon motion of appellants, a writ was ordered to issue against the said board to show cause, &c. The writ embodied the complaint, petition, and affidavits.

The defendant appeared and demurred to the writ, as stated by the record, because the same does not state facts sufficient, &c.



The demurrer was sustained, which presents the only question in the case.

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1860.

We think the Court erred in sustaining the demurrer. The mode of proceeding, pointed out by the statute, appears to have been substantially complied with. Nothing is urged here, in the case at bar, against the validity of the statute. See the case of *The Board of Commissioners of Jasper County v. Spitler*, at the last term. (1)

HOSIER  
v.  
ELIASON.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*J. O'Brian, A. Daggy, S. C. Willson, J. E. McDonald, and A L Roache*, for the appellants.

(1) 13 Ind. R. 285; and see the argument in that case.

### HOSIER and Another v. ELIASON.

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148	80

The payee of a bill of exchange, after acceptance, indorsed to A. who indorsed to a bank. After protest for non-payment he took up the bill and sued the drawer and acceptor. The latter answered, 1. A general denial. 2. That the bank charged 12 per cent. for discounting the bill. 3. That the plaintiff, for a consideration, and without the defendant's knowledge, released the drawer.

*Held*, 1. That the second paragraph was bad; that it was no concern of the defendants what discount the bank charged A.

2. That the third paragraph was bad for uncertainty; that if the release was in writing, it, or a copy of it, should have been filed—if not, the terms and consideration should have been set out; but *quære*, whether if well pleaded, the paragraph would be a bar.

If a party demur, and pending his demurrer plead over, the pleading overrules the demurrer; but if both could stand, it would be presumed, upon a general finding, that the issues on both were referred to the Court together.

If at the institution of a suit a writ of attachment issue, and the defendant fail to answer to it, and judgment is rendered against him, the costs of the writ are to be taxed against him with the costs of the cause.

APPEAL from the *Wayne* Circuit Court.

Wednesday,  
June 13.

PERKINS, J.—*Madren* drew a bill of exchange, addressed to *Jesse Hosier, New York*, requesting him to pay to

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1860.

HOSIER  
v.  
ELIASON.

the order of *Joshua Eliason*, at the office of *Winslow, Lannier & Co.*, New York, 4,467 dollars and 14 cents, value received, and charge the same to account of drawer. *Hosier* accepted the bill. *Eliason* indorsed it to one *Morton*, who indorsed it to the *Richmond* bank.

The bill was protested for non-payment. *Eliason* paid and took up the bill, and sued *Madren* and *Hosier*, the drawer and acceptor.

*Madren* made default. *Hosier* defended. He alleged in his answer—

1. A general denial.
2. That the bank charged 12 per cent. for discounting the bill.
3. That the plaintiff, for a consideration, and without the knowledge of the defendant, released *Madren*.

A demurrer was sustained to the second and third paragraphs.

The second paragraph was bad. It was no concern of *Hosier's* what rate of discount the bank charged *Morton* for discounting the bill. *Conwell v. Pumphrey*, 9 Ind. R. 135.

The third paragraph was bad for uncertainty. If the release was in writing, it should have been filed, or a copy of it. If it was not, the terms and consideration of it should have been set out, that the Court might have determined upon its validity. See *Page v. Ford*, 12 Ind. R. p. 46, where it is held, that an answer averring the acceptance of an article sold should set out the manner of acceptance—the acts relied on as constituting it. See, as to a release, 1 Ind. R. 313; 4 *id.* 465; 9 *id.* 371; Ind. Dig. p. 713. Probably this third paragraph, if well pleaded, would have constituted no bar.

The defendant amended this paragraph. See, as to effect of this step, Ind. Dig. p. 650, § 182.

The plaintiff again demurred; but before any action was taken upon the demurrer, he replied over in denial.

The cause was then submitted to the Court, by agreement of parties, and judgment was rendered for the plaintiff.

It is contended that error appears in the record, because there was no decision on the demurrer.

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1860.

There are two answers to this objection:

MAHON  
v.  
TRABER.

1. A party cannot demur and answer to the merits at the same time to the same paragraph. Hence, where this is attempted, either the demurrer or answer must give way. The rule is, in such cases, that the answer overrules the demurrer, and puts it out of the case. Ind. Dig. p. 640. But,

2. If both could stand, it would be presumed that the issues on both were referred to the Court together, and decided in the general finding. This has been often decided. See the cases cited in Ind. Dig. p. 653, § 208.

At the institution of the suit, a writ of attachment was duly issued. The defendant did not answer to the attachment, and the costs of it were taxed against the defendant with the costs of the cause. This was right.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*W. A. Bickle and G. W. Julian*, for the appellants.

*O. P. Morton, M. F. Kibby, J. S. Newman, J. P. Siddall, and J. B. Julian*, for the appellee.

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MAHON v. TRABER and Another.

The law authorizing judgment without relief upon a class of contracts, is constitutional.

APPEAL from the *Huntington* Court of Common Pleas. *Wednesday,*  
*June 12.*

*Per Curiam.*—Suit on note. Judgment by default. The judgment was without relief. The case was not put in a state below to show error on appeal.

It is said the law authorizing judgment without relief, upon a class of contracts, is special and unconstitutional.

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1860.

MITCHELL.  
v.  
DIBBLE.

We do not think so. It is a general, uniform law, operating upon all persons, throughout the entire state alike, so far as relates to a defined class of contracts. We think that is a general law. See *Reed v. The State*, 12 Ind. R. 641.

The judgment is affirmed with 5 per cent. damages and costs.

*J. R. Coffroth* and *L. P. Milligan*, for the appellant.

*W. H. Coombs*, for the appellees.

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MITCHELL and Others v. DIBBLE and Others.

If the improper admission of testimony be complained of, the bill of exceptions should distinctly present the points, and the statement by the Court of such facts as may have affected the decision.

An outstanding mortgage, where there has been no ouster of the purchaser holding under a deed, is no bar to a suit for purchase-money.

Wednesday,  
June 13.

APPEAL from the *Warren* Circuit Court.

PERKINS, J.—Suit upon a promissory note, given for the last installment of the purchase-money for a tract of land.

Answer, denying a tender, or offer of a tender, of a deed, and setting up an outstanding mortgage. Issues of fact upon the paragraphs of the answer.

The cause was tried by the Court. Judgment for the plaintiffs.

It is urged by the appellants that improper testimony was admitted, as appears by points reserved during the progress of the trial; but the bill of exceptions is not so made as to distinctly present the points, and there is no statement of the Court of such facts as may have existed rendering the admission of the evidence proper or improper. See 2 R. S. p. 116, § 347.

There is another bill of exceptions containing evidence; but it does not state that the evidence set out in it "was

all the evidence given in the cause." Hence, we cannot say that the evidence is before us, and must, therefore, presume it sustains the judgment of the Court. We have, however, looked through the evidence contained in the bill. It does not appear by the bill that any exception was taken to any part of it, and we think its weight, in the aggregate, tends to justify the finding below.

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1860.

WRIGHT  
v.  
SCHNEIDER.

As a general proposition, an outstanding mortgage, where there has been no ouster of the purchaser holding under a deed, is no bar to a suit for purchase-money. *Reasoner v. Edmundson*, 5 Ind. R. 393.

*Per Curiam*.—The judgment is affirmed with 3 per cent. damages and costs.

*B. F. Gregory* and *J. Harper*, for the appellants.

*R. A. Chandler*, for the appellees.

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WRIGHT v. SCHNEIDER.

A contract for timber-trees, to be cut and taken away at the convenience of the purchaser, is complete, it seems, when the trees are marked.

APPEAL from the *Ripley* Circuit Court.

Wednesday,  
June 13.

*Per Curiam*.—Suit for the price of fifty timber-trees, sold and marked upon the ground, and to be taken away by the purchaser. The price was agreed upon. The suit was commenced before a justice of the peace. There was a recovery before the justice by the plaintiff; and so there was, on appeal, in the Circuit Court. The trees were cut and taken away by the defendant, at such time as suited his convenience. Upon such a contract, it seems, that the sale is complete when the trees are marked.

We are unable to perceive the reason why this cause was appealed to this Court.

No question is made except upon the evidence. But the record does not purport to contain all the evidence.

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1860.

HUNTER  
v.  
McCoy.

Again. On the evidence in the record, the case falls within the rule in criminal cases. The judgment is right beyond not only a reasonable doubt, but beyond any doubt whatever.

The judgment is affirmed with 10 per cent. damages and costs.

*A. Brower*, for the appellant.

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HUNTER v. McCoy.

APPEAL from the *Jefferson* Circuit Court.

*Per Curiam*.—In a suit for the correction of a mistake in a deed, the additional remedy of quieting title may be had, if the facts stated in the complaint justify it. In a suit upon a mortgage, the double remedy of correction and foreclosure may be had upon a proper complaint. *Perk. Pr.*, p. 661.

Where an issue is made and tried, the Court grants any relief consistent with the case made by the complaint and embraced within the issue, without regard to the prayer for relief. *Perk. Pr.*, p. 658.

The judgment is reversed with costs, with leave to the plaintiff to amend, if he desires to do so, and with leave to the defendant to answer, the demurrer being overruled.

*J. W. Gordon*, *A. H. Conner*, *E. Dumont*, and *O. B. Torbet*, for the appellant.

*C. E. Walker*, for the appellee.

14 528  
167 168

Wednesday,  
June 13.

## MEREDITH and Others v. LACKEY.

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1860.MEREDITH  
v.  
LACKEY.

14	529
137	329
139	191

A junior mortgagee, though not a necessary, is a proper party to a proceeding by a senior to foreclose.

Where the plaintiff in vacation, after a continuance of the cause, filed an additional averment to his complaint, bringing in a new defendant, who answered setting up a new demand against the original defendant, it was held that the latter might have a continuance till the next day, or for a reasonable time, to enable him to answer; that the pleading was in the nature of a complaint; and that he did not waive error in refusing such continuance, by complying with an order to answer immediately.

The original defendant, in such case, answered, filing interrogatories without affidavit. The new defendant replied in denial, without answering the interrogatories. A rule was taken for such answers; but the record did not show the time within which they were to be filed. A bill of exceptions showed that the new defendant was absent at the time his reply was filed; but no motion was made for an attachment to compel such answers. *Held*, that the original defendant could not have a continuance to obtain such answers, without affidavit.

If a bill of exceptions state that a party was absent at the time his pleading was filed, he will be held to have been absent although his pleading have his name to it as if he had filed it in person.

The failure to grant a request not heard by the Court, is not error.

*It seems*, that the amount of the judgment may be varied from the amount of the verdict, because of any admission in the pleadings, on motion.

If the reply set up, even argumentatively, facts inconsistent with the allegations in the answer, it is sufficient.

APPEAL from the *Wayne* Circuit Court.

Wednesday,  
June 13.

HANNA, J.—*John A. Lackey* averred, in substance, that *Meredith* executed his note for 1,500 to *Catharine Lackey*, *John A. Lackey*, *Robert S. Lackey*, and *Richard M. Lackey*, and that his wife joined with him in a mortgage on certain real estate to secure the payment thereof; that the note was assigned to plaintiff, who asked judgment for the amount and the foreclosure, &c.

The defendants answered, that the note was given for a part of the purchase-money of the lands described in the mortgage; and that the said lands were a part of the estate of one *Ira Lackey*, of whom the said payees were the widow and heirs; that one *Richey* was the executor of said estate and claimed the proceeds of said note, and had forbid the payment to said heirs; that defendants had paid a

May Term,  
1860.

MEREDITH  
V.  
LACKEY.

part, &c., to said executor, which was to have been credited on said note; that he held a claim, &c., against said estate, which he asked might be set off, and that *Richey* might be made a defendant, &c.

*Richey* filed a petition, sworn to, stating such facts as induced the Court to order that he be made a party; but as no judgment was taken against him, and as he does not join in the appeal, we shall not further notice the questions raised by such petition, &c.

Reply, that after the death of *Ira Lackey*, certain parties, naming them, had, in a proceeding in said Court against this executor, widow, and heirs, obtained a decree directing a sale of said lands, and the application of the proceeds to the payment of certain sums due to said parties, and the return of the overplus, if any, to the defendants; that the sale was to be as upon execution at law, &c., and that said lands were sold by virtue of said decree, and *Meredith* became the purchaser for the sum of 4,333 dollars, being two-thirds of the appraisement thereof, and received possession under said purchase, to all which the executor and widow assented.

Upon the filing of these pleadings, the case was continued; and during vacation the plaintiff filed an additional averment to his complaint, namely, that since the purchase of *Meredith*, to-wit, &c., he had created a junior incumbrance by way of a mortgage to one *Peelle*, who was made a defendant.

Upon the calling of the case for trial, on the fourteenth day of the next term of the Court, *Peelle* appeared and filed his pleading, together with a note and mortgage, claiming that there was due him some 1,300 dollars from said *Meredith*.

No rule was taken against *Meredith* for answer, but he moved that the case be continued until the next day to enable him to answer. This the Court refused, and required him to answer immediately. He then answered, setting up usury, and filed interrogatories to *Peelle* directed to that point. *Peelle* immediately replied in denial, but did not answer the interrogatories. A rule was taken against



*Peelle* to file such answer, but without the same having been answered, and, over the objection of the defendants, the Court proceeded to trial, &c. No affidavit accompanied the interrogatories. The bill of exceptions states *Peelle* was absent, although the reply has to it the name of said *Peelle* as if he had filed it in person. No motion was made for an attachment to compel an answer from *Peelle*. *Lackey* did not reply, nor in any manner respond to the pleading of *Peelle*. A trial was thereupon had, and a verdict returned in favor of *Lackey*, and, also, in favor of *Peelle*. Motion for a new trial overruled, and judgment on the verdict.

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1860.

MEREDITH  
V.  
LACKEY.

On these facts questions of practice are presented by the parties.

First. Was it error to compel the answer (at the time) of *Meredith* to the pleading of *Peelle*?

The junior mortgagee was not a necessary, though a proper party to the proceeding. *Mack v. Grover*, 12 Ind. R. 254.—*Pattison v. Shaw*, 6 *id.* 377.—Story's Eq. Pl. § 193 and note.—Calvert on Parties in Eq., p. 128; but the plaintiff made him a party, and whether, without the consent of the plaintiff, the pleading of *Peelle* could have been filed at the time it was, if thereby the progress of the suit of said plaintiff might have been delayed, we need not decide, for no objection by *Lackey* is shown. Indeed, the attorneys for *Lackey* appear, also, to have acted for *Peelle*. But if he had failed to answer, no judgment could have been rendered in his favor. *Kenton v. Spencer*, 6 Ind. R. 321. His rights, if he had any, as against the plaintiff (*Howe v. Woodruff*, 12 Ind. R. 214), might have been concluded. 6 *id.* 324. It was, therefore, the act of the plaintiff that brought *Peelle* into court, and caused the filing of the pleading at the time it was filed, and if *Meredith* was thereby entitled to further time, no question of hardship upon the plaintiff, could have been permitted to weigh.

It is insisted that this is not such a pleading as, under the circumstances, required an affidavit from *Meredith*, under 2 R. S. p. 48, § 97, to entitle him to a continuance, but that he was entitled thereto as a matter of right, because

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MEREDITH  
v.  
LACKEY.

the pleading, as against him, operated and should be regarded as an original complaint; and that if, in this, the defendant is mistaken, then he was entitled to a delay of one day, or a reasonable time to answer (*id.* p. 42, § 68); and that, in this instance, such time was not allowed.

As to this whole proposition, we are of opinion that the pleading filed by *Peelle*, claiming as it did a judgment, &c., against *Meredith*, was, for that purpose, a new and substantive pleading to enforce a separate and distinct demand (12 Ind. R. 254), not embraced in the original complaint, nor such as, under that complaint alone, would have authorized *Peelle* to take a judgment thereon against the appellant, and, therefore, he should not have been compelled to respond to the same immediately. Whether the case should have been continued until the next term, is a question not raised by the record, although presented in argument, and we intimate no opinion thereon; but that the appellant was entitled to such reasonable time as was necessary to enable him to answer that branch of the case, we have no doubt. We are further of opinion, as the pleading of *Peelle* did not make nor tender any issue on the complaint of *Lackey*, nor pray any relief as against him, that so far as the pleadings show, no right thereby accrued to the appellant to delay a recovery of a judgment, &c., on the claim of said *Lackey*. But if a judgment had been taken on such claim, and the cause continued, in consequence of such pleading, as to the junior mortgage, a question might, perhaps, have been made as to the application of the overplus, if any, arising from the sale of the lands. But as to that, it seems to us an order could have been made to operate upon the officer, so as to compel an application in the contingency of a recovery, without prejudicing the rights or interests of either party. It will, perhaps, be said that a sale, before a final adjudication upon all the incumbrances sought to be enforced, would tend to prevent competition at such sale. The junior mortgagee did not ask to redeem the senior mortgage, and be subrogated to the rights of the holder thereof; nor in any other manner indicate that he desired delay, for the

purpose of obtaining relief or security against the plaintiff. Whether he could have made a case, in that respect, which would have prevented a final judgment in favor of *Lackey*, before his claim was also passed upon, we need not determine. He did not attempt to make such a case. A default could not have been legally entered against the appellant if he had failed to obey the order of the Court to answer immediately the pleading on the junior mortgage; but as he filed an answer, the question is, whether by that act he waived the error of the Court in making the order. We are of opinion that he did not. He had by exception reserved the question; and cases might perhaps arise in which great present inconvenience, and ultimate injury, might result from standing by and permitting a judgment, under the circumstances, for want of an answer.

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1860.

MEREDITH  
v.  
LACKEY.

The next point made, is upon the refusal of the Court to continue the cause for an answer to the interrogatories. The record does not show within what time the answer was to be filed, under the rule therein granted. The statute (Acts of 1855, p. 59,) requires the Court to fix the time within which the answer is to be filed. If the party should fail to file it within the time, the opposite party could, by taking proper steps, delay the cause, and compel an answer. *Cleveland v. Hughes*, 12 Ind. R. 512.

The statement in the bill of exceptions that the defendant was absent, must control, the presumption being in favor of the action of the Court, and that the absence was such as authorized that action, and made known to the Court in the proper manner. *Boswell v. Travis*, 12 Ind. R. 524. And, therefore, the statutory affidavit should have been filed.

A bill of exceptions states that on the motion for a new trial, it was shown to the Court that before the jury was sworn, defendant's counsel asked time to prepare the affidavit; but that the judge did not hear the request. The failure to grant a request not heard, could not, under ordinary circumstances, be error. The party should, at the time, have excepted, and caused the exception to be noted. This would certainly have brought the matter to the notice

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1860.

MEREDITH  
v.  
LACKEY.

of the Court. Whether, when the matter was brought to the attention of the Court upon a motion for a new trial, a new trial should have been granted for that cause, was a matter much within the discretion of the Court. We cannot say there was an abuse of that discretion.

The remaining point is, that the verdict was contrary to the evidence, &c. The evidence is not in the record. But it is insisted that the portion of the answer setting up a set-off is not contradicted by the reply, and is, therefore, admitted, and should have been so considered by the jury. We have not the evidence upon which the verdict was found. We have only the pleadings. If the Court should have varied the amount of the judgment from the verdict, because of any admission in the pleadings, perhaps the proper mode to have reached that question would have been by a motion in the Court below. 2 R. S. p. 121, § 372. No such motion was made. But is there an admission by the pleadings? The answer set up that the note was given for lands purchased of the heirs, &c., of *Ira Lackey*, and that the executor claimed the proceeds had been partly paid, and a claim held against the deceased for another part. The reply does not directly deny this, and it is claimed that therefore, under § 74, 2 R. S. p. 44, the appellant was entitled to the benefit of the set-off at least. Although the reply does not directly deny the answer, yet it sets up a state of facts inconsistent with those alleged in such answer. It avers the land was purchased by the appellant, under a decree of the Court for the sale thereof, in favor of judgment-creditors of the deceased; that he had paid that purchase-money, and taken possession, &c., with the consent of the executor. This controverts, perhaps argumentatively, the allegations in the answer as to the consideration of the note. Pleading in that form has been held sufficient for some purposes. *Riddle v. Parke*, 12 Ind. R. 90.—*Cooke v. Williamson*, 11 *id.* 242.—*Id.*, 293. The averment of payment to the executor, of a part, by the appellant, and that he held a claim against the deceased, &c., may not, perhaps, be controverted by the reply; but such a state of facts is set up as

shows that even if such payment was made and claim held, they were not a proper set-off. It appears to us that if the issue thus made was found for the plaintiff, the allegation as to the set-off was then properly disregarded by the jury.

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1860.

DIPPLE  
v.  
DOUGLAS.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs as to that part of the judgment in favor of *Lackey*; and reversed with costs as to the judgment in favor of *Peelle*.

*O. P. Morton* and *J. F. Kibbey*, for the appellants.

*J. S. Newman* and *J. P. Siddall*, for the appellee.

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DIPPLE v. DOUGLAS.

If *A.* lease a house and lot to *B.*, and *B.* assign the lease to *C.*, who occupies the premises, and *C.* dig a hole, by which, after the expiration of his lease, and after the lessor has resumed the possession, the cellar of *D.*, an adjoining tenant of *A.*, is flooded with water: *Quære*, whether *A.* can fill up the hole and pay *D.* the damage sustained by means of it, and sue *C.* for the amount expended.

It is error to refuse to instruct the jury, in such case, that if they find from the evidence that *D.*'s cellar would have been flooded if the hole had not been there, they cannot make the damage to him a part of their verdict.

APPEAL from the *Vanderburg* Circuit Court.

Wednesday,  
June 13.

PERKINS, J.—This suit was commenced by *Douglas* against *Dipple*, before a justice of the peace, to recover 50 dollars.

The complaint of *Douglas* was this: He owned two adjoining pieces of property in the city of *Evansville*, which were occupied severally by tenants, viz., *John Dipple* and *Eugene Kappler*. *Dipple* dug a hole upon the piece of property—a lot—occupied by him, which filled with water and overflowed into the cellar of *Kappler*, the other tenant of *Douglas*. *Douglas* filled up the hole, at a cost of 11 dollars, and paid *Kappler* 39 dollars for his injuries from the overflow, making 50 dollars, which he

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1860.

DIPPLE  
v.  
DOUGLAS.

alleges he paid for the wrongful act of *Dipple*, and which sum he seeks to recover back by means of this suit.

Upon the trial on appeal in the Circuit Court, it appeared that the premises occupied by *Dipple* were leased by *Douglas* to one *William M. Walker*, for a period of ten years, ending *August* 1, 1859, at a certain ground rent, *Walker* paying also the taxes, and having the right to remove any buildings he might erect on the premises, at any time within two months from the first day of *August*, 1859, but not afterwards. If they were not removed by the expiration of said two months, they became the property of *Douglas*. Nothing was said in the lease about rent for the two month's extension of time; nor was there, as to excavating or filling up, or otherwise, cellars.

*Walker* assigned this lease to *Dipple*, who occupied as his assignee. Such being the case, it might well be looked into to see if this action lies against him by the original lessor. See 4 Kent, p. 96; 1 Chit. Pl., pp. 17, 116, *et seq.*; Taylor's Land. and Ten., p. 294. But the point has not been made, and we shall not examine it.

It appears that *Dipple* removed the buildings erected on the leased ground within the two months allowed, and *Douglas* took possession. Nothing appears to have been said about the cellar at that time. It does not appear but that *Douglas* might have thought it would be useful for a subsequent tenant for years, or for the accommodation of a building intended to be erected by himself.

It further appears that in *November*, 1859, being more than a month after *Douglas* had re-possest himself of this lot, with the cellar upon it, there came an unusual freshet, which occasioned the filling of *Kappler's* cellar with water, producing the main injury out of which has grown this suit; and further that *Douglas* had the cellar filled up.

The evidence tends strongly to show that *Kappler's* cellar would have been filled by water, in the freshet, if there had been no cellar on the lot which had been occupied by *Dipple*, and is far from satisfactorily showing any liability

on the part of the latter to any one on account of the fact; yet the Court refused this instruction: May Term,  
1860.

"If the jury find from the evidence that *Kappler* would have sustained the damage from the filling of his cellar by the extraordinary rain if *Dipple's* had not been there, the jury cannot make that damage a part of their verdict." MIDDLETON  
v.  
MILLER.

*Per Curiam.*—The judgment is reversed with costs. Cause remanded, &c.

*A. L. Robinson*, for the appellant.

*J. G. Jones* and *J. E. Blythe*, for the appellee.

**BURKE v. THE INDIANAPOLIS AND CINCINNATI RAILROAD  
COMPANY.**

APPEAL from the *Decatur* Court of Common Pleas. Wednesday,  
June 13.

*Per Curiam.*—On the facts in this case, the judgment is affirmed with one quarter of one per cent. damages and costs (1).

*J. Gavin* and *O. B. Hord*, for the appellant.

*J. S. Scobey*, for the appellees.

(1) The facts in the case cannot be briefly stated, nor is the importance of the decision commensurate with the space they would occupy.

**MIDDLETON v. MILLER.**

The defendant cannot be compelled to answer a complaint to which a demurrer has been sustained, unless the record made by that ruling be changed.

APPEAL from the *Adams* Court of Common Pleas. Wednesday,  
June 13.

HANNA, J.—*Miller* sued *David C.* and *Benjamin F. Middleton* on a note which he averred they executed to one

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1860.

AINSWORTH  
v.  
ATKINSON.

*Meyers*, who assigned the same to plaintiff without indorsement in writing.

The record shows that a demurrer was sustained to the complaint. The demurrer assigned for cause that the complaint did not state facts sufficient, nor make *Meyers* a defendant. The record does not show for which cause the demurrer was sustained.

The case was continued for several successive terms of the Court, after which, upon a rule being taken, one of the defendants answered, issues were formed, and a trial was had, which resulted in a verdict and judgment for the plaintiff.

The proceedings were all erroneous after the demurrer was sustained; that is, the Court had no power to order or compel an answer to a complaint which had been declared imperfect, and such as should not be answered, whilst the record made by that ruling remained in force and unchanged by any further action of the Court.

*Per Curiam*.—The judgment is reversed with costs. Cause remanded, &c.

*D. Studabaker* and *W. March*, for the appellant.

*L. M. Ninde* and *H. W. Puckett*, for the appellee.

14	538
126	390
127	512

14	538
163	297

14	538
167	159

### AINSWORTH v. ATKINSON and Others.

A suit to enforce a lien upon real estate, is in the nature of a suit to foreclose a mortgage, and is not embraced by § 10, 2 R. S. p. 451, conferring civil jurisdiction upon justices of the peace.

In a suit to enforce a mechanic's lien, an answer alleging that the property is now owned by a third person, but not denying the ownership of the defendant at the time the lien attached, is bad.

Wednesday,  
June 13.

APPEAL from the *Wayne* Court of Common Pleas.

PERKINS, J.—Suit to enforce a mechanic's lien upon real estate. The amount for which a lien was claimed was less than fifty dollars. It was claimed that, therefore, the



Common Pleas had not jurisdiction; that the suit should have been brought before a justice of the peace.

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1860.

But a suit to enforce a lien upon real estate is in the nature of a suit to foreclose a mortgage, a proceeding in chancery under the former practice, and is not embraced by the section of the code (2 R. S. p. 451, § 10,) conferring civil jurisdiction upon justices. Perk. Pr., p. 639.

ROLOSON  
v.  
HERR.

The defendant answered, that the property on which the lien was sought to be enforced was then owned by a third person, but did not deny the ownership of the defendant at the time the lien attached.

This answer was no defense.

*Per Curiam.*—The judgment is affirmed with 10 per cent. damages and costs.

*J. Perry*, for the appellant.

*W. A. Bickle*, for the appellees.

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ROLOSON and Another v. HERR.

The certificate of a person acting as judge, made out of Court, and not made part of the record, to the effect that the parties, by consent, extended the time for filing bills of exceptions, will not be considered; nor is a bill of exceptions filed after the time—there being no order of the Court permitting the filing—a part of the record.

APPEAL from the *Jefferson* Circuit Court.

Wednesday,  
June 13.

*Per Curiam.*—In this case, the errors assigned are based upon the ruling of the Court upon instructions given and refused, and upon the question of the sufficiency of the evidence to sustain the verdict.

The record shows that, as to these points, the Court granted thirty days to prepare bills of exceptions, &c., and those contained in the record were not filed until long after that time.

There is, among the papers on file in the case in this Court, a statement or certificate, purporting to have been

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1860.

RIDGE  
v.  
SUNMAN.

made about a year after the trial, of the gentleman who presided as judge at the trial, in substance, that by verbal agreement of the attorneys in the case, the time was extended indefinitely in which such bills might be prepared, signed, and filed; and it shows impliedly that this agreement was with his approbation.

There is a motion here to strike out the bill of exceptions. There was no subsequent order of Court, of record, granting leave to file it.

Whether, under the circumstances, an order of Court permitting the party to file such bills after the time limited by the record, would have rendered valid such act, is a question not, therefore, before us. As the record stands, the bill of exceptions is not properly a part thereof. The certificate of the person acting as judge, made out of Court, and not in any form made a part of the record, cannot be considered.

The record presents no question for our determination. *Simonton v. The Huntington, &c.*, 12 Ind. R. 380.

The judgment is affirmed with costs.

*C. E. Walker, S. C. Stevens, J. W. Chapman, and J. Sullivan*, for the appellants.

*T. T. Crittenden, W. M. Dunn, and J. W. Hendricks*, for the appellee.

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RIDGE and Others v. SUNMAN and Others.

Wednesday,  
June 13.

APPEAL from the *Ripley* Circuit Court.

*Per Curiam*.—In this case the points made are upon the rulings of the Court upon demurrers and in relation to the admission of evidence.

There was no exception saving the first point, nor motion for a new trial so as to reserve the second.

There is nothing before us. *Kent v. Lawson*, 12 Ind. R. 676.

The judgment is affirmed with 3 per cent. damages and costs.

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*J. Ryman*, for the appellants.

*E. Dumont* and *O. B. Torbet*, for the appellees.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD COMPANY  
v. PARKINSON.

APPEAL from the *Shelby* Court of Common Pleas.

Wednesday,  
June 13.

*Per Curiam*.—The judgment in this case is affirmed with 10 per cent. damages and costs, the points raised in it having been decided in several other cases.

*J. S. Scobey*, for the appellants.

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Complaint in two paragraphs—1. Upon a written contract for plowing and planting 40 acres of prairie land, at 175 dollars, 50 dollars payable in cash when the planting was done, and the balance payable in corn at 15 cents per bushel, from the crop, and if sufficient should not be produced, the deficiency was to be paid in cash. 2. Upon an account for plowing and planting 40 acres of prairie land, at 4 dollars and 50 cents per acre. Affidavit by defendant that there was but one contract, and motion in writing that plaintiff be compelled to elect upon which paragraph he would rely. The motion was overruled. *Held*, that this was not error.

In actions on contract, where a demand is necessary before suit, the failure to make or aver a demand is excused by an averment showing that the defendant is not in a condition to perform or offer to perform.

APPEAL from the *Tippecanoe* Court of Common Pleas. Thursday,  
June 14.

HANNA, J.—*Hawkins* sued *Wilstach*. His complaint contains two paragraphs:

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1. Upon a memorandum of agreement between the parties.

2. For work and labor.

The writing is as follows:

"Memorandum of agreement, made this 11th day of *May*, 1857, between, &c. Said *Hawkins* agrees to break the s. e. s. e., sec. 29, t. 25, r. 6 w., in, &c., adjoining said *Hawkins'* land, to plant the same in corn in a good, farmer-like manner the present season, in the usual mode of planting sod land, for 175 dollars, of which 50 dollars to be paid as soon as corn planted, and the remainder to be paid by the crop raised, taking corn enough in the shock, in the field, to pay the balance at the rate of 15 cents per bushel, if enough is raised, if not enough, the deficiency to be made up in cash by said *Wilstach*," &c.

The first paragraph avers that the plaintiff performed, &c., and that the defendant did not perform in this "that he failed to pay the plaintiff the balance of 125 dollars, either by furnishing corn in the shock in the field, according to the terms of the contract, or in any other manner, but so to do, although often requested; has failed and refused," &c.

The second is for breaking 40 acres of land at 4 dollars and 50 cents per acre.

The defendant filed his affidavit, stating that there never existed but one contract between the parties—that attempted to be embodied in the writing sued on, and that both paragraphs were based upon the same supposed cause of action; and, also, his written motion, that the plaintiff be compelled to elect upon which paragraph he would rely.

The Court overruled the motion, to which ruling, the record of the clerk states, the defendant excepted. There is no bill of exceptions embodying the affidavit, or the motion and ruling thereon.

We cannot perceive that the Court erred in this ruling. Whether the affidavit of a party would be sufficient in any instance to base such a motion upon, we need not decide, as we do not believe the facts in this case are such as required an order of the kind by the Court.

The defendant demurred to the first paragraph of the complaint, because it did not state what the deficiency was, nor did it specially aver a demand of the corn or of the money, &c. The demurrer was overruled.

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It is insisted with much earnestness by the defendant, that the proper construction of the contract would require the plaintiff to shock the corn, husk it, and measure it, and then show to, and demand of, the defendant the balance, or deficiency, if any; and that the complaint should, by proper averments, charge these things to have been done.

We do not so construe the contract, the main features of which were, that the plaintiff was to break and plant a certain number of acres of land, for which the defendant was to pay 175 dollars—50 dollars when the planting was done. Corn that might be produced by such planting was to be taken at a fixed price per bushel in the shock in the field. Of course certain labor was necessary to place it in shock before it was in a condition to be taken by the plaintiff. As no direct agreement was made by these parties as to who should perform, or be at the expense of, that labor, we are clearly of opinion it fell upon the owner of the corn; and if he failed, as is alleged, to cause it to be so placed in shock, he would not have the crop so raised, in the condition necessary to enable him to perform, or offer to perform, his part of the contract as to the delivery of said corn. It is manifest that a sufficient excuse is, therefore, shown for not making or averring a special demand of the corn, even if such demand was necessary.

The defendant answered to the second paragraph of the complaint:

1. A general denial.

2. That he never made any contract other than the written one, &c.; that he did not agree by said contract to put said corn in shock; that the crop lies neglected and spoiling; that defendant has paid 57 dollars, &c., and has performed, &c.; That *Hawkins* has made no demand on him for said crop, nor offered to receive the same.

As well as we can gather from the record, the above con-

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tains the substance of those parts of the answer not stricken out.

Upon motion of the plaintiff, a portion of the answer to said second paragraph was stricken out, but no bill of exceptions appears in the record containing the parts so stricken out, and the insertion thereof by the clerk does not bring the same before us in proper form to enable us to pass upon the ruling of the Court.

The answer to the first paragraph is, that the defendant reiterates and reaffirms each and every allegation and averment in the second paragraph of his answer to the second of the complaint. There was no demurrer to this answer.

A general denial, by way of reply, was filed to that as well as the second paragraph of the answer to the second paragraph of the complaint.

Trial by the Court; finding for the plaintiff; and judgment, over a motion for a new trial, for 125 dollars.

The evidence is not in the record; we must, therefore, presume it was sufficient to sustain the finding.

*Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*H. W. Chase* and *J. A. Wilstach*, for the appellant. (1)

*J. M. La Rue* and *D. Royse*, for the appellee. (2)

(1) The counsel for appellant argued as follows :

This claim, in the most favorable view of it for the appellee, was, in substance, for the delivery of specific articles (bushels of corn) in a case where the day of delivery was left undetermined. In all such cases, a special demand before suit must be averred and proven with circumstantiality of time and place. *Frazee v. McChord*, 1 Ind. R. 224.—*Peters v. Gooch*, 4 Blackf. 515. And a general averment, though often requested, *licet sæpius requisitus* (as in the complaint), will not do. *Worley v. Mourning*, 1 Bibb, 254.—*Miller v. Alcorn*, 3 id. 267.—6 Hill, 297. And the want of such averment of demand is fatal, even after default, or after issue and verdict. *Horine v. Best*, 2 Bibb, 550.—*Gibbs v. Stone*, 7 Mon. 303. Where payment is to be made in something besides money, the institution of a suit (which is a legal demand for money only) is premature unless preceded by a demand for the payment provided for by the contract, and until such demand be first shown, the defendant is not bound to prove anything in defense. 1 Iowa, 396. In *Cook v. Ferral*, 13 Wend. 287, in which the claim was for a hundred bushels of oats to be delivered in a few days, at two shillings per bushel, a demand was held necessary before suit, and, though no objection was made on the trial, still the want of

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an allegation of demand was held a substantial defect, going to the foundation of the plaintiff's action, and good ground for reversing the judgment. The brevity of pleading authorized and required by the revised code, of course does not justify the omission of substantial averments in pleadings, but renders their introduction all the more imperative. "The plaintiff must state the facts constituting his cause of action," is the language of the code. 2 R. S. p. 38, § 49. The identical question, however, has arisen in *New York*, under a code from which, in this particular, ours is a mere transcript. *Carpenter v. Brown*, 6 Barb. 150, decides "that where an actual request is necessary, it must be laid specially." The appellee has no ground to argue in favor of any presumption that this demand (though not averred) was proven on the trial, because the Court expressly ruled upon the demurrer that no such question was before the Court, and the appellant then and there reserved the point for this Court by his exceptions duly taken. Besides, the rule maintained by all the authorities is that the demand must be both averred and proven. *Frazee v. McChord*, and the other authorities cited, *supra*.

The appellant, however, desires to go further, and show that the appellee, even though he should bring a new suit after demand, can never cure his neglect of the crop and his failure to ascertain its amount. This point will arise in the discussion of the errors assigned, which we proceed to discuss in the order of their assignment.

*First.* The error in overruling the motion to compel the plaintiff below to elect on which paragraph of his complaint he would rely, and to strike out the other.

In *New York*, where the code as to the nature of the complaint is the same in substance as ours, this point is decided in several cases cited by *Voorhies*, in his *Treatise on the Code*, p. 154: "As there can be but one substantially true statement of a single cause of action, the practice of setting it forth in different counts is necessarily abolished. A merely formal one is unnecessary, while a substantial one would involve a contradiction, and one must be false." (STRONG, J., *Lackey v. Vanderbilt*, 10 How. Pr. R. 161.) "If a plaintiff, having really only one cause of action, set it forth in several counts or divisions in his complaint, the remedy of the defendant is by motion that the plaintiff elect on which count he will rely, and that the others be struck out." "The motion should be supported by evidence in some way that the several counts are all based on one and the same cause of action." (*Ibid.*) "That evidence is usually the affidavit of the defendant." Voorh. Code, p. 154, note *d*, and see the other authorities there cited. See 2 R. S. pp. 44, 46, §§ 77, 92.

*Second.* The error in overruling the demurrer.

The first ground of demurrer is, that the complaint does not state what the "deficiency" provided for in the contract was (if any). By the express terms of the contract, *Wilstach* was only to be liable for this deficiency. The work is to be paid for "by the crop raised." But if not enough is raised, "the deficiency is to be made up in cash by said *Wilstach*." *Wilstach*, as admitted by the complaint, has paid the 50 dollars he stipulated to pay on the corn being planted. He has done all that he contracted to do except to pay this deficiency, if there is any deficiency. Now, it is arithmetically and legally impossible to ascertain what this deficiency is, without first stating the crop and setting down its value. The price, 15 cents per bushel, is fixed so that the calculation could be readily made. *Hawkins* is clearly bound to exhaust the corn

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before looking to his employer for money. It is obvious from the whole provisions of this contract that *Wilstach* was to have nothing to do with the farmership of this crop. The field, as the contract shows, adjoined *Hawkins'* field. He agrees to do the work in a farmer-like manner. He agrees to "break" the ground, to "plant" it, and to "take" corn enough to pay him if enough is raised. He even undertakes the furnishing of the seed-corn, *Wilstach* furnishing the money, 7 dollars. *Hawkins* is, then, throughout, the working man in this contract, *Wilstach* agreeing only to furnish money and not work. It won't do to say (as the appellee's attorneys did in the lower Court, and will probably repeat in this,) that *Wilstach* was to shock the corn, because, in the first place, *Hawkins* is to be paid "by the crop raised" by his own labor; and, secondly, the provision that he should take it in the shock is for his benefit, that he may have shocks as well as corn—a natural provision for a farmer to make in his own behalf. No! he must not only shock it, but go further. After shocking it, he must *husk* it, and then *measure* the ears of corn, so as to know whether he has too little or too much to pay him. Says *Pothier*, in his *Treatise on Obligations*, pt. 3, c. 1, No. 512: "If I have sold the wine of my vineyard" [here "the crop raised"] "to a merchant, the delivery ought to be made in my repository," [here the contract itself says the corn shall be taken in the field,] "where the wine" [corn] "is. He should send for it there, and load it at his own expense. My obligation is to deliver it to him where it is. And I am not obliged to take it up, but merely to give him the key, and permit him to do so. This is conformable to the law 47, § 1, ff. de leg. 1. *Si quidem certum corpus legatum est ibi praestabitur ubi relictum est.*" Again, says *Pothier*, in the same connection, § 513: "Agreements ought, in respect to the things which are not expressed by the parties, to be interpreted rather in favor of the debtor, than of the creditor, in *cujus potestate fuit legem oportius dicere.*"

The complaint does not allege that there was any deficiency whatever, whence the clear inference is that there is no cause of action against said *Wilstach*, but the 125 dollars must have been all paid "by the crop raised."

We only ask that in the construction of this contract, the rule laid down by Judge DAVISON, in *Maggart v. Chester*, 4 Ind. R. 124, may be applied: "The Court will look into the whole agreement, and give it a construction consonant to the intention of the parties."

Says PARKER, J., in *Sumner v. Williams*, 8 Mass R. 214: "The situation of the parties, the subject-matter of the contract, and the whole scope of their agreements will be taken into consideration in determining the legal effect of their contract."

Should the Court be of opinion that the true import and meaning of the agreement is doubtful, and that the intention of the parties cannot be determined from its language, "the right doctrine is," says FLETCHER, J., in *Barney v. Newcomb*, 9 Cush. 56, "that it shall be construed most strongly in favor of him who has been misled, and has advanced his money upon it."

In the U. S. Dig. of 1854, tit. Agreement, p. 21, No. 84, a case is stated, where although a party has promised to pay money on request, yet because it was apparent from the whole scope of the contract that the raft of logs purchased was to be floated to defendant's wharf, he was held not liable to pay even after demand made and proved, until the raft should be floated thereto. *Kennaird v. Jones*, 9 Grat. (Va.) 183. So here the whole scope of the agreement shows that the crop was first to be gathered and measured before *Wil-*



*stach* could be called on for any more money; and in this view, it is immaterial on whom it fell to gather the crop. If on *Wilstach*, no demand has yet been made on him to deliver it; if on *Hawkins*, he should account for the crop, and deducting it from 125 dollars, show how much money is due him, if any.

In *The State v. Beard*, 1 Ind. R. 461, Judge PERKINS has well remarked, that if a person agree to perform labor and take his pay in a specific article, and there be no fraud or warranty, he will be bound thereby though the article be of less value than he supposed. Is not this doctrine applicable here? Has *Hawkins* any right to throw up and abandon the corn crop, though it be a meagre one, but is he not compelled to take it in payment as far as it will go?

The appellee will probably endeavor to defend this complaint as having been drawn under the form contained in 2 R. S. p. 343, No. 8. It has been doubted by this Court whether these forms have any legal existence—there being a defect in the title of the act whereby they are supposed to be authorized. *The State v. Wilson*, 7 Blackf. 516. This form, however, was evidently intended by its framers only for complaints for specific performance, as its tenor and even its title imports: “On an agreement in writing—specific performance—damages for breaches.” But the appellee having no taste for the performance of contracts (either specifically or generally), repudiates this clause, and introduces in its place—what? A fictitious demand for work and labor, which he must have known, as sworn to by the appellant, to be false and a sham, and which it was the duty of the Court to reject. 2 R. S. pp. 44, 46, §§ 77, 92.

It may be urged by the appellee that he declares in his complaint that he “performed all the conditions on his part.” This general language, it is true, is authorized by statute. 2 R. S. p. 45, § 84. But he proceeds himself to qualify it by showing that he is unable to make any statement of the crop raised, and consequently of the deficiency which is the gist of his action; and it is idle to say that he has performed all the conditions on his part to enable him to bring a suit, when he confesses that one of the conditions he has wholly neglected. The general language used is insufficient as an allegation of demand, and certainly cannot be taken to mean that which the party himself by his pleading denies to be its meaning. But even in allowing general pleading of a condition precedent, the statute does not release a party from his obligation to show this performance. 2 R. S. p. 45, § 84. The appellee, however, impliedly says there is no such condition, which the agreement (as much a part of the complaint as any other) says there is, and the Court below assist him in ignoring and repudiating this condition, which to claim now as embraced within the formal words of a printed precedent, comes from him with a poor grace.

We earnestly urge the Court to decide this point fully. It was unquestionably the duty of *Hawkins* to gather and measure the corn (whether more or less was raised) to the extent of his claim upon it, and after finding its value at the rate of 15 cents per bushel, to apply to *Wilstach* for the deficiency it showed in paying the 125 dollars. In this case, any reasonable man may well see there would be little probability of a suit between these parties. Several of the authorities hereinafter cited are applicable to this point, and the attention of the Court is solicited to them.

This point disposes of the case at once and forever, and renders the other

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questions unimportant; but as they have been assigned, we proceed with their discussion.

The second ground of demurrer is that the complaint does not aver a demand made for the corn raised. This point is fully discussed above, and is incontestably with the appellant.

See, further, *Johnson v. Powell*, 9 Ind. R. 568.

On an agreement to pay in farm produce, the demand must be made at the debtor's farm. *Loddell v. Hopkins*, 5 Cowen, 516. The work done was a job of clearing.

*Third.* The error in striking out parts of defendant's answer to the complaint.

In *Port v. Williams*, 6 Ind. R. 219, and same parties, 9 *id.* 551, this Court decide that where matter in an answer is pertinent to the case and not a sham defense, it cannot be struck out on motion. "A motion to strike out (say the Court) does not perform the office of a demurrer either under the old or new practice. Whether it was a sufficient defense to bar the action was wholly immaterial. It was; at least, such pertinent matter as the Court ought not to strike out on motion. It was not so irrelevant as to warrant that; it was not a sham defense. 2 R. S. p. 44. We are, therefore, of opinion that the Court erred in sustaining the motion to strike out." This language is in every word applicable to the answer now under consideration, and is decisive of this point. Indeed, the answer contains good matter even in bar of the action. The case of *Johnson v. Baird*, 3 Blackf. 153, 182, and the numerous class of authorities which has followed, shows that when time and place are both named, the defendant bars the action if he set apart the articles, and even is excused if he show a readiness at time and place to deliver. Is this rule any less applicable where, the time being indefinite, the defendant shows that he has always been ready to deliver, more especially when it is shown that the plaintiff had the whole control of the subject-matter of the contract.

But even should the Court incline to think (which we scarcely can think they will) that the matter is not good in bar, yet the answer was clearly pertinent. Its object was threefold:

- 1st. To show the contemporaneous circumstances.
- 2d. To show the usage and custom of farming sod land.
- 3d. To explain the ambiguities in the contract.

Each was a legitimate object.

The reason in each case is a comprehensive and all-sufficient one (*i. e.*, admitting, for the sake of the argument, that the agreement raises doubts), and that reason is, that without the aid of parol evidence, the written contract cannot be applied to its proper subject-matter. *Bradley v. The Washington, &c., Packet Co.*, 13 Peters, 89.—*The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat. 337.—*Maggart v. Chester*, cited *supra*.—*Conwell v. Pumphrey*, 9 Ind. R. 135.—*Port v. Williams*, 6 *id.* 219.—*Trullinger v. Webb*, 3 *id.* 198.—*Rex v. Laindon*, 8 T. R. 382.—*Roberts on Frauds*, p. 11.

The Court, in its construction of this contract, is compelled to know or ask what the term "corn raised," and "the raising of corn," mean, as applied to sod land. Is, or is not anything further necessary or proper, than merely breaking and planting? The agreement requires the planting to be done in a "good, farmer-like manner," and refers in terms to "the usual mode of plant-

ing sod land." It seems material to know (in case of doubt) whether anything more was to be done after the planting towards raising the crop, because if nothing more, then certainly *Wilstach* had no hand in raising the crop, and the whole charge of it falls upon *Hawkins*.

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These questions would probably suggest themselves on the very face of the agreement, but whether they do or not is immaterial. The doctrine of one of the most recent decisions is as follows: "If the words used in a contract are technical, or local, or generic, or equivocal, on the face of the contract, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case." *Brown v. Brooks*, 25 Penn. State R. (1 Casey), 210. This doctrine is called that of annexing customary incidents. "It constitutes an exception to the general rule that an instrument, complete on its face in all its parts, and importing to be the exclusive expositor of the sense of the parties, shall not receive additions from parol evidence. The cases go on the principle of a presumption that in such transactions, the parties did not intend to express in writing the whole of the contract by which they intended to be bound, but to make a contract in reference to these known usages." Per PARKE, Baron, in delivering the judgment of the Court in *Hutton v. Warren*, 1 M. and W. 466.—4 Phil. Ev. (ed. of 1850), C. and H.'s notes, part 2, p. 562.—Story on Cont., §§ 670, 671 a.—1 Greenl. Ev., §§ 286, 287, 288, 292. This doctrine will have the greater force in an agreement where the most casual inspection shows, as its title imports, it was not the full agreement between the parties, but only a memorandum—only the jotting down—it wants even grammatical construction—of such parts of the contract as it was thought at the time it would be desirable to preserve in a written form. Evidently the memorandum was written without any expectation, on the part of the appellant, of the happening of an insufficient crop, and the consequent necessity or utility of proving the customary mode of raising corn on sod land. It is easy also to see that if the crop had been a full one, the appellee would have exhibited a liberal and ample compliance with the rule in *Pothier*!

*Eaton v. Smith*, 20 Pick. 150, was an action on a bond, in which the phrase to operate on land was used, and the defendant was permitted to introduce evidence that the word operate, as applied to eastern timber lands, was understood in *Maine* to include selling stumpage; that is, selling off the timber growing, to be cut and removed by the purchaser. The Court (C. J. SHAW) say: "That when a new and unusual word is used in a contract, or when a word is used in a technical and peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it."

Again. Who was to "shock" the corn? and who was to measure it? These questions are not answered by the contract in express terms, and we are authorized to look beyond it. A very late case holds this language: "Extrinsic parol evidence is always admissible to give effect to a written instrument by applying it to its proper subject-matter, by proving the circumstances under which it was made, thereby enabling the Court to put itself in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties." *Hildebrand v. Fogle*, 20 Ohio R. 147.

"Technical words and surrounding circumstances, which materially affect

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their meaning, are to be interpreted by the jury." Per Judge STORY in *Washburn v. Gould*, 3 Story's C. C. R. p. 162.

"In the construction of contracts, the first rule is to make them speak the intention of the parties as gathered from the entire transaction. Other rules are subordinate to this, and when they contravene it, are to be disregarded." *Gray v. Clark*, 11 Verm. R. 583.—*Kelly v. Mills*, 8 Hammond, p. 225.

"This is the great rule of interpretation," says PATTERSON, J., in 4 Dall., p. 347.

In *Vance v. Bloomer*, 20 Wend., p. 199, it is said: "In the very learned case of *Roberts v. Beatty*, 2 Penn. R. 65, Ross, J., there said: 'We must consider the subject-matter of the agreement; the object of making it; the sense in which the parties mutually understood it at the time it was made; the place where it was entered into; the use to which any articles stipulated to be delivered were to be applied; if materials for building, when and where to be used; and finally, the practical exposition and the general understanding, custom, and usage amongst those who enter into similar contracts in the execution and performance.

To the same effect are the authorities in this Court. *Dickson v. Kelsey*, 2 Blackf., p. 189.—*Kelsey v. Dickson*, 3 Blackf., p. 236.—*Maggart v. Chester*, and *Conwell v. Pumphrey*, cited, *supra*.—*Port v. Williams*, and *Trullinger v. Webb*, *supra*.—*Lewis v. Matlock*, 3 Ind. R. 120.

It will probably be contended by the appellee that parol evidence is inadmissible to vary or contradict a written agreement, and set up a new one. This is conceded. 7 Ind. R. 547, per PERKINS, J.—6 *id.* 379.—8 Blackf. 237.—*Id.* 277.—*Id.* 295.—2 Ind. R. 477.—*Id.* 656.—7 Blackf. 432.—6 *id.* 183. But the authorities are equally decisive that parol evidence is admissible to explain a written agreement, or even to add customary incidents as above shown, for this is not contradicting or varying the contract, but enforcing it in its strictly just and proper terms. *Rex v. Laindon*, *supra*, is, perhaps, the leading case in establishing this distinction, and is worthy of a more extended notice than we are able at present to give it, as having the high, legal sanction of the names of Lord Kenyon and his colleagues Grose, Lawrence, and Le Blanc, each of whom delivered opinions. It was a case in which the Court allowed the introduction of a new word, "apprentice," by parol into a written agreement. And where fraud is alleged a written agreement may be even annulled or substantially varied by parol evidence. *Irwin v. Ivers*, 7 Ind. R. 310.

The facts set up in the clauses of the answer which the lower Court struck out, especially the latter clause, might well induce a jury to say that the appellee had forfeited his right to recover anything, and would even authorize the appellant to have made a counter-claim that his 57 dollars be returned to him.

It may be said by the appellee that the allegations in the answer are, in some instances, "as the defendant is informed and believes." It has been decided in *New York*, under a similar code, that allegations, even in the complaint, may be on information or belief when the facts are not presumptively within the peculiar knowledge of the party. Vansantvoord on the Code, p. 201.—*Howell v. Frazer*, 1 Code R., N. S., p. 270. No stronger allegation is necessary, even in an affidavit. *Simpkins v. Mallat*, 9 Ind R. 543.

(2) Counsel for the appellee argued as follows:

The appellant complains of the judgment of the Court below:

1. Because the Court below overruled his motion to compel the appellee to elect upon which paragraph of his complaint he would rely, and strike out the other. The evidence is not set out in the record, and, therefore, the Court cannot say but that evidence was given to the matters alleged in both counts. One count is on a special contract, and the other is the common count for work and labor. In the one an agreed price and mode of payment is alleged; in the other the plaintiff proceeds on a *quantum meruit*. At common law it was the practice, in actions like the present, to join, in the same declaration, a count on an instrument not under seal, with the common counts in assumpsit. 1 Chit. Pl. (4 Am. ed.), p. 392.—3 Blacks. Comm., p. 295. Our statute has not changed the common law in this particular, and the practice has prevailed in this state without question, except in the case of *Bates v. Dehaven*, 10 Ind. R. 319, and there the Court plainly intimates that two paragraphs may be “based upon one cause of action.”

In cases like this, the authorities show the importance of setting up the claim in different forms in the same complaint. *Coe v. Smith*, 1 Ind. R. 267.—*McKinney v. Springer*, 3 Ind. R. 59.

The policy of our statutes is to allow parties to determine their controversies in one proceeding. 2 R. S. p. 37, tit. complaint, p. 39, tit. answer. “Where there are several counts, one good one among them will support a general verdict for the plaintiff.” Perk. Dig., p. 635, and authorities cited.

The *New York* code differs from ours. The section prescribing the forms of pleading, as cited in *Voorhies’ New York* code, is as follows: “All the forms of pleading heretofore existing are abolished, and hereafter the forms of pleading in civil actions in Courts of record, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed by this act.” The distinction between the *New York* code and ours (2 R. S. p. 37, § 47) is apparent. The *New York* code abolishes “all the forms of pleading heretofore existing” in that state. Ours only abolishes those inconsistent with the provisions of the practice act. The old practice of adding one or more common counts to a count on a special contract, is not inconsistent with the provisions of our practice act, and, therefore, not abolished.

2. He complains because the Court below overruled the demurrer filed by him to the first paragraph of the complaint. The causes of demurrer are specially set forth, and by reference to the demurrer and first paragraph of the complaint it will be readily perceived that the demurrer is not well taken. The complaint avers that the appellant wholly failed to perform the stipulations of his contract, “either by furnishing corn in the shock in the field, according to the terms of said contract, or in any other manner, but so to do, although thereunto often requested, has hitherto wholly neglected and refused,” &c. No deficiency was to be ascertained by the appellee, because the appellant had failed to put the corn in shock, as it was unquestionably his business to do by the terms of the contract. If this was not the intention of the parties, why use the words “in the shock in the field?” This was to be the condition of the corn when taken by the appellee, and if the appellant failed to put it in that condition, he became liable to pay the contract price for the work in money.

There are further reasons why the judgment of the Court below should be affirmed. The evidence is not set out in the record, and by the provisions of 2 R. S. p. 163, § 580, “where the merits of a cause have been fairly tried and

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determined, a judgment will not be reversed, although error may have intervened." *Rockhill v. Spraggs*, 9 Ind. R. 30. See, also, 3 Ind. R. 385, 430, as to the presumption arising when the party appealing fails to set out the evidence.

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The law authorizing judgment and execution without relief from valuation laws, where such relief is waived in the contract, is valid as to promissory notes and bills of exchange. *Quære*, whether upon other instruments containing such waiver, judgment can be rendered accordingly.

Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say that he got no consideration.

The mother of a bastard may settle and dismiss a bastardy suit brought on her relation.

A wife may be bound by the acts of her husband in reference to her separate property, where such acts are done by her authority and approved by her.

Thursday,  
June 14.

APPEAL from the *Marion* Circuit Court.

*Per Curiam*.—Suit by *Jeremiah*, assignee of *Joseph T. Roberts*, upon a promissory note of the following tenor:

"One day after date, we, or either of us, promise to pay *Joseph T. Roberts*, or bearer, the sum of 200 dollars, for value received, without relief from valuation laws, and with interest.

*Thomas Baker,*  
*Jacob Lawson.*"

"September 9, 1858.

The Court rendered judgment for the plaintiff without relief, &c.

In this it is said the Court erred, because the section of law authorizing such judgment is unconstitutional, not being properly included under the title of the act.

There may be force in this position so far as it is applicable to instruments other than bills and notes; but as to them, legislation under the title of the act is valid. *Mewherter v. Price*, 11 Ind. R. 199. Probably a provision in another part of the code renders such judgments valid upon all instruments stipulating for it, but this point we leave open.

14	552
141	366
14	559
148	98

Fraud and want of consideration were also urged against the validity of the note. The cause was tried by the Court without a jury, and thus the questions of law and fact were decided by the same tribunal. We must presume the decision correct, unless the contrary appears, both upon points of law and questions of fact.

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No fraud appears to have been proved, and the party appears to have received all the consideration he required as the inducement to the note. In *Hardesty v. Smith*, 3 Ind. R. 39, it is said that where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say he gets no consideration. The same doctrine is asserted in *Major v. Brush*, 7 Ind. R. 232. See Walk. Am. Law (3d ed.), p. 405, note c.

The mother of a bastard child may settle and dismiss a bastardy suit brought on her relation. Perk. Pr., 579.

A wife may be bound by the acts of her husband in reference to her separate property, where they are performed by her authority and approved by her.

The judgment is affirmed with 5 per cent. damages and costs.

*N. B. Taylor* and *W. Wallace*, for the appellant (1).

(1) Counsel for the appellant, after reciting the pleadings and evidence, made the following argument:

We rely for the reversal of the judgment of the Court below, on the following points:

I. There was no consideration for the said note in this—

*First.* Sections 14 and 15, 2 R. S. p. 488, provide that if the jury find that the defendant is the father of such [bastard] child, or the defendant in Court confesses the same, he shall be adjudged the father of the child, and stand charged with the maintenance and education thereof; and the Court shall, on such verdict and judgment, make such order as may seem just, for the securing such maintenance and education to such child, by the annual payment to such mother, or if she be dead, or an improper person to receive the same, to such other person as the Court may direct," &c.

Hence it follows that the money ordered to be paid by the Court, in such cases, is for the maintenance and education of the child, and the mother, or whoever else the Court appoints to receive such money, is merely a trustee to collect and receive it, for the use declared by the statute. The judgment, or provision made by the Court, is the fund, and the trustee cannot divert or destroy the fund; a sale, or attempted sale and transfer, of the fund is therefore void.



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The judgment or order, in such case, is clearly under the control of the Court; and upon proper application made to the Court, and good cause shown, the person appointed by the Court, to receive the money, may, at any time, be removed, and some other suitable person appointed in the stead.

And suppose the child should die? After its death the defendant would not be liable to pay anything; for the money is for the maintenance and education of the child. This seems so plain, as not to require argument or authority.

The assignment of the mother, then, would have amounted to nothing, much less can the assignment of *Hiram Rhoads* be of any effect, even if done with her knowledge and consent.

*Second.* *Lawson* testifies that the consideration of the note was the procuring of *Hiram Rhoads* to assign the judgment against *Ayres* to witness and defendant *Baker*; that *Joseph T. Roberts* said to him, witness, that he could get *Hiram Rhoads* to assign the judgment to witness and *Baker*, if they would give him (*Roberts*) their note for 200 dollars, and a note to *Rhoads* for the same amount (pretty good bonus where neither *Roberts* nor *Rhoads* had any right); that he (*Lawson*) went to defendant, *Baker*, and they went to him (*Roberts*) and made the note sued on in consideration he would procure *Rhoads* to assign the judgment; that *Roberts* had no difficulty and but little trouble in procuring the assignment; that *Rhoads* was willing to make the assignment; that they (witness and defendant, *Baker*) also gave their note to *Rhoads* for 200 dollars more.

Does this evidence show a sufficient consideration to support the note? It surely cannot be that it does. There was no benefit to the promisors, for the assignment, as we have shown, was void; and if it had not been void, it placed the sureties (*Baker* and *Lawson*) in no better position than they were before it was made. Besides, *Joseph T. Roberts* sustained no loss or inconvenience, nor did he subject himself to any charge or obligation at the instance of the defendant *Baker*, or even *Lawson*.

CHITTY, in his work on Contracts, says: "The main rule in regard to the sufficiency of the consideration seems to be that it may arise either, first, by reason of a benefit resulting to the party promising, or at his request, to a third person, by the act of the promisee; secondly, on occasion of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, at the instance of the person making the promise, although such person obtain no advantage therefrom."

BROOM, in his Commentaries on the Common Law, top p. 248, says: "To constitute a contract valid in law, there must have been a request to the contractee by the contractor. This request, however, need not, in all cases, have been express; it will very often be implied by law."

But if it appears affirmatively that there was no request by the contractor to the contractee, it necessarily follows that none can be implied.

Now it is manifest that the assignment by *Rhoads* was invalid. But did *Roberts* sustain any loss or inconvenience, or subject himself to any charge or obligation, by what he did? It seems not. What he did was not difficult, and he had but little trouble. *Rhoads* was willing to make the assignment. The conclusion must therefore be that *Roberts* had no difficulty or trouble at all, and subjected himself to no charge or obligation; for the charge or obligation contemplated by law must be real, and where it appears affirmatively that none in reality existed, no room for implication exists.



If, however, *Joseph T. Roberts* sustained any loss or inconvenience, or subjected himself to any charge or obligation, was it done at the request of the defendant *Baker*, or even *Lawson*? It was not. *Lawson's* evidence is conclusive. "*Joseph T. Roberts* said to him," (*Lawson*) "that he could get *Hiram Rhoads* to assign the judgment," &c.

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What *Joseph T. Roberts* did was done at his own instance and request, not at the instance and request of the promisors. *Joseph T. Roberts* knew that *Rhoads* was willing to make the assignment, and therefore went and proposed it; or he and *Rhoads* concocted the matter, and he then went to *Lawson* and proposed it for the purpose of defrauding the sureties. This conclusion is irresistible.

But grant, for the sake of the argument, that *Joseph T. Roberts* sustained some loss or inconvenience, or incurred some charge or obligation at the instance of the promisors, does not this rule apply? "So in respect to the extent of trouble, loss, or obligation, which the promisee has taken upon himself, at the promisee's request, we shall observe, upon considering the cases referred to, that it is immaterial that the detriment or charge thus assumed, is, in fact, of the most trifling description, provided it be not utterly worthless in fact and in law." Chit. on Cont., p. 32.—Story on Cont., p. 485, § 431.

Now the assignment, as we have shown, was not only worthless in fact and in law, after it was made; but if it had not been, the services rendered in getting the assignment were utterly worthless in fact and in law, for it placed the promisors, the sureties or bail of *Ayres*, in no better position than they were before, nor gave them any greater advantage than they had before it was done. This ought to settle the question. But the services were not only worthless in fact and in law—they were rendered at the instance of *Joseph T. Roberts* himself—done upon his own proposition, the proposition of an attorney too, which of itself alone (if it be not a rule of law in these latter days, that all honor and virtue in, and regard for, the profession is lost, and that every man is bound to be on his guard against a lawyer,) ought to be a guaranty of worth and benefit; if, therefore, the assignment were of any force in law (which it is not,) and a slight benefit might be imagined to accrue to the promisors, or a slight damage or inconvenience be suffered by the promisee (which could only be by a heavy tax of that quality of the mind—imagination,) *Joseph T. Roberts* ought to be regarded as a volunteer, and entitled to nothing, no odds how much trouble he may have had.

II. But suppose the benefit to the promisor, or the inconvenience or damage to the promisee, in this case, might be, in the language of STORY, "susceptible of any legal estimation," does not this rule apply? "Where, however, the inadequacy of consideration is so gross as to create a presumption of fraud and overreaching, or of unconscientious advantage taken under circumstances of distress or improvidence on one side, or of mental incompetency on the other, the contract founded thereon cannot be enforced at law or in equity." Story on Cont., p. 437, § 432.

Is it possible to conceive a case where the facts bring it so fully and clearly within every branch of the foregoing rule? In the whole history of jurisprudence a stronger case cannot be found. It does not need to recapitulate the facts. They are fresh in our memory, and fresh in the memory of the Court yet. The case occupies the very verge of the precipice, ready to topple over—the thickness of a hair would make it a downright felony.

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III. *Joseph T. Roberts* was the attorney of *Matilda Quackenbush*, alias *Matilda Rhoads*, and represented, or ought to have represented, the interests of the bastard child. He was an attorney; and everything in the transaction shows that a confidence—yea, a blind confidence—was placed in him by the defendant *Baker*, as well as by *Lawson*. It was his duty, therefore, to inform them what, and whether any, benefit would accrue to them from the proposed assignment; and as soon as the defendant *Baker* proved in what attitude *Roberts* stood, that the consideration of the note was the procuring the assignment of the said judgment by *Rhoads*, that it was upon *Roberts*' instance; and the relation of *Roberts* to the bastard child, the *cestui que trust* in the judgment against *Ayres*, the burden of proof was thrown on him, or his assignee, the plaintiff, to show the perfect fairness, adequacy, and equity of the transaction. 1 Story's Eq. Juris., §§ 310, 311.—5 Blackf. 509.

Mr. *Taylor* afterwards submitted the following argument upon the point that the law authorizing judgment and execution without relief, &c., is not valid:

I insist that the law is void:

*First.* Because the only statute giving such authority is § 15, of the act entitled "An act concerning promissory notes and bills of exchange," 1 R. S. p. 379. This section is in these words: "Upon any instrument of writing, made in this state or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered and execution had accordingly." The first section of this act (1 R. S. p. 378) declares "that all promissory notes, bills of exchange, bonds, or other instruments of writing, signed by any person, who promises to pay money, or acknowledges money to be due, or for the delivery of a specific article, or to convey property, or to perform any stipulation therein mentioned, shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively."

In the case of *Mecherter v. Price*, 11 Ind. R. 199, so much of the above act as refers to other instruments of writing than promissory notes and bills of exchange, is decided to be void, because it is not embraced in the title of the act. This decision completely eviscerates the first section of the act, and makes it read thus: "Be it enacted by the General Assembly of the state of *Indiana*: That all promissory notes [and] bills of exchange, shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively." Or thus: "Be it enacted, &c., That all promissory notes [and] bills of exchange, signed by any person who promises to pay money, shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively."

In the first example I have omitted the clause in the section, "signed by any person who promises to pay money," and inserted it in the latter. But this clause must necessarily be stricken out; for a promissory note is a written promise, and a bill of exchange a written order or request for the payment of money absolutely and at all events. Baily on Bills, p. 1.—Chit. on Bills, pp. 1, 516.—Story on Notes, p. 1, § 1.—Story on Bills, p. 4, § 3. And the clause "signed by any person who promises to pay money," cannot be accurately used as to a bill of exchange, and would embrace a promise to pay money on a contingency, as also bonds and other instruments having none of the qualities of a promissory note.

The terms "promissory note" and "bill of exchange," have a well under-

stood and settled legal meaning or signification, and there is nothing in the subject of the act as expressed in the title, nor in the body of the act, which contemplates a change in that established definition. If, then, the Court adhere to the decision in *Mewherter v. Price*, § 15 of the act concerning promissory notes and bills of exchange is clearly void; for that section declares, as we have seen, that "upon any instrument of writing, made in this state or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered, and execution had accordingly;" and the rule is well settled, that if the part of the statute which is void, is so connected with other portions, which might otherwise be valid, that the two cannot be separated, the whole enactment is void. 2 Blackf. 8.—4 Ind. R. 342.—6 How. Miss. R. 625.

In the case of *Mewherter v. Price*, 11 Ind. R. 201, the Court say: "We have seen that the title to the act under consideration, is limited to promissory notes and bills of exchange. Its language is very explicit, and we know of no rule of construction by which it can be so extended as to embrace instruments of writing other than those which it expressly names." The Court, therefore, under the above rule, sustained the act as to promissory notes and bills of exchange, and as to all other instruments of writing, declared it void. Why? Because, in the first section of the act, promissory notes and bills of exchange, being specifically named, separate from all other instruments in writing, the valid could be separated from the void—the tares could be separated from the wheat.

But suppose the first section of the act had been couched in this language: "Be it enacted by the General Assembly of the state of *Indiana*, That all instruments in writing, signed by any person who promises to do or perform any act or stipulation therein mentioned, shall be negotiable by indorsement thereon, so as to vest the property thereof in each indorsee successively," could the Court have held any part of it valid? Clearly not; because the valid part, if it had any such, would not constitute a complete and operative act within itself. *Clark v. Ellis*, 2 Blackf. 8.—*Maize v. The State*, 4 Ind. R. 342. The connection would have been such that no separation could be made, and the whole would have been void. 6 How. Miss. R. 625.

Now § 15 of the act is couched in this general and inseparable language, "upon any instrument of writing, made within this state or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered, and execution had accordingly." This language, it is true, would include promissory notes and bills of exchange, which have been decided to be embraced in the title of the act; but it also includes bonds, mortgages, leases, building agreements, and written contracts of every kind, which, along with other stipulations, contain a promise to pay money, and none of these are particularized. How, then, can the Court make a separation? Can any division be made? Can the Court declare part of that section void, and leave any part which will be complete and operative within itself? Clearly not. It is as if the tares had grown, and were imbedded in the grains of the wheat, and to get at the tares and destroy them, you must also crush and destroy the grains of wheat.

*Second.* Because no authority to render judgments without any relief from appraisement laws, and have execution accordingly, can be derived from the mere promise to pay without any relief from appraisement laws. This, by

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analogy, is conclusively decided in the case of *Develin v. Wood*, 2 Ind. R. 103. See 7 Wis. R. 582.

*Third.* Because no authority to render judgments without any relief from appraisement laws, on promissory notes which contain a promise, and bills of exchange which contain a request to pay money without any relief from appraisement laws, can be derived from the practice act; and if it could, there is no authority in the practice act to issue an execution thereon, and enforce its collection without any relief from appraisement laws. This is easily demonstrated. Section 381, 2 R. S. p. 123, provides that "when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment. When a plaintiff has included in one action, demands subject to the appraisement laws, with demands made payable without relief from appraisement laws, the Court may render separate judgments upon such demands."

There are two provisions in this section, and I will examine them separately.

1. "When a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment."

It is important, then, to inquire when, or in what cases, it is provided that a judgment shall be executed without any relief from appraisement laws. The following are the cases mentioned in the statute:

1st. Upon any instrument of writing, made in this state or elsewhere, containing a promise to pay money without relief from valuation laws. 1 R. S. p. 379, § 15.

2d. Property conveyed by a debtor with intent to hinder, delay, or defraud creditors. 2 R. S. p. 138, § 456.

3d. Judgments on bonds of executors, administrators, and guardians, as to the property of the principal. 2 R. S. pp. 287, 328, §§ 164, 26.

4th. Judgments in prosecutions for bastardy. 2 R. S. p. 489, § 16.

This clause of § 381 of the practice act, does not, then, authorize or declare that a judgment shall be rendered without any relief from appraisement laws, nor in what cases it shall be so rendered. It simply declares that when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment; and to ascertain when, we must resort to the statutory provisions above cited.

2. "When a plaintiff has included in one action, demands subject to the appraisement laws, with demands made payable without any relief from appraisement laws, the Court may render separate judgments upon such demands."

This portion of the section is merely directory, but the former is positive. In the one case "it shall be so ordered in the judgment;" in the other, "the Court may render separate judgments upon such demands." But this is not important. What demands are subject to the appraisement laws? Clearly, such demands as by the law are not exempted from the appraisement laws; for we have seen that the mere agreement of a promisor, in the absence of a statute, will not have that effect.

Now a statute which conflicts with the constitution, is not a law; it is worthless and void. If, then, there be no statute declaring promissory notes made payable without any relief from appraisement laws, exempt from the appraisement laws, they are subject to the appraisement laws, although they contain

the promise to pay without any such relief. The cases, then, not subject to appraisement laws, are those which some valid statute exempt from the benefit of such laws; and to discover these, we must refer to the statutes. But this we have already done; and by so doing, have clearly ascertained that § 15 of the act concerning promissory notes and bills of exchange is void.

Now, it is apparent from this section,

1st. That a judgment cannot be executed without any relief from the appraisement laws, unless it is so ordered in the judgment.

2d. That all demands are subject to the appraisement laws, unless there is a valid law exempting them, or some of them, from the benefit of such laws, whatever be their substance or form.

3d. That to determine when a judgment is to be executed without any relief from appraisement laws, the statutes must be resorted to; and if, in any case, the statute professing to give such authority is void, judgment cannot be so rendered, or if it is, that part of the judgment is void.

4th. That neither portion of § 381 of the practice act declares in what cases a judgment shall be executed without any relief from appraisement laws, for the first branch of the section presupposes certain laws on the subject, declaring the cases in which a judgment is to be executed without any relief from appraisement laws, and the second, which is merely directory, that in a certain contingency, the Court may render separate judgments.

But suppose the Court does not, in the case declared, render separate judgments, but should render the usual judgment, subject to the appraisement laws, could the defendant sustain a writ of error, or could the plaintiff sustain such writ, unless there was a valid law exempting one of the claims sued on in the action, from the benefit of the appraisement laws, and the Court should refuse to so render a judgment thereon? Clearly not. If, however, a plaintiff, in such a case, had omitted to take a separate judgment waiving any relief from the appraisement laws, in a case authorized by the law, the omission might be corrected on notice and motion in the Court where it was rendered (2 R. S. p. 48, § 99), but in no other way; for it is clear that a plaintiff could not complain of his own neglect in a Court of error, or if he did, that his complaint would not be heeded.

But again, observe the language of this part of § 381: "When a plaintiff has included in one action, demands subject to the appraisement laws, with demands made payable without any relief from appraisement laws, the Court may render separate judgments upon such demands."

"Demands subject to the appraisement laws," is the general rule, and demands not subject to the appraisement laws, is the exception under our law. The former is the superior and overruling, the latter the inferior and exceptional, and cannot be, unless provided by law. 2 R. S. p. 137, § 445.

I say "superior and overruling," because it is superior to, and overrules the agreement of, the parties, except in the cases provided for by the law (see 2 Ind. R. 102, already cited), and exceptions are odious and must be confined to the cases specified. What, then, is the case specified? It is where a plaintiff has included in one action, demands subject to the appraisement laws, with demands made payable without any relief from appraisement laws. There is no provision made for a case where a plaintiff brings an action on a single demand made payable without any relief from appraisement laws. But suppose the Court has power from this portion of the section alone, to render sep-

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arate judgments, the one subject to appraisement, and the other without any relief from appraisement, it does not declare that the latter judgment shall be executed without any relief from appraisement, nor does the former portion of the former section so declare, but leaves that to be determined by other statutes; and it by no means follows that, because a judgment is rendered without any relief from appraisement laws, it is lawful to execute it without any relief from such laws; and besides, 2 R. S. p. 137, § 445, positively declares that "no property shall be sold on any execution, or order of sale issued out of any Court, for less than two-thirds of the appraised cash value thereof, exclusive of liens and incumbrances, except where otherwise provided by law." There must, then, be a specified case or cases, provided by the law, wherein such sales shall be made; and such provision must be valid.

But the case specified is single, being exclusively confined to the one instance in which the two kinds of demands are included in the same action, and the declaration in that single case is, "that the Court may render separate judgments upon such demands," without stating how these separate judgments shall be rendered; and if an inference as to how, could be deduced from it, in the particular case mentioned, there is no enunciation in the entire section, that in that single case of the inclusion of the two sorts of demands in the same action, the judgment shall be executed without any relief from appraisement laws, or in what cases judgment shall be so executed.

But is there anything in the practice act, prescribing the kinds of execution and their requisites, that will explain, aid, assist, or control this hiatus?

The practice act provides that there shall be three kinds of execution—one against the property of the judgment debtor; one against his person; and one for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. 2 R. S. p. 130, § 408. It also provides, that the execution must issue in the name of the state, and be directed to the sheriff of the county, sealed with the seal, and attested by the clerk of the Court. It must intelligibly refer to the judgment, stating the Court where, and the time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:

*First.* If it be against the property of the judgment-debtor, it shall require the sheriff to satisfy the judgment out of the property of the debtor, subject to execution.

*Second.* If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment out of such property.

*Third.* If it be against the body of the judgment-debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county, until he shall pay the judgment, or be discharged according to law.

*Fourth.* If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto; and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits, recovered by the same judgment, out of the property against whom it was rendered, subject to execution, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had, and shall, in that respect, be deemed an execution against property. 2 R. S. p. 130,



§ 411. This is all; and there is nothing in it prescribing that an execution shall issue, in any case, commanding the collection of a judgment without any relief from the appraisement laws.

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This, then, affords no explanation, aid, or assistance, in any particular. How, then, does the case stand? Why, we are necessarily, and without recourse, driven to § 15 of the act concerning promissory notes and bills of exchange, for the authority to render judgments without any relief from appraisement laws, and to have execution thereon accordingly, upon any such note containing a promise, and upon any such bill containing a request to pay money without relief from appraisement laws; and by this alone must we stand or fall. But this provision has been clearly and conclusively shown to be void, if the decision in *Mewherter v. Price* is correct, and is adhered to; and no one has yet, or ever will, presume to question the correctness of that decision. There is, therefore, no law authorizing such a judgment, and such an execution on promissory notes, bills of exchange, or other instruments of writing containing a promise to pay money, without any relief from appraisement laws; for the other provisions of the statute, as we have seen, do not refer to the form of the instruments, as in the case of judgments on the bonds of executors, administrators, and guardians (2 R. S. p. 387, § 164; *id.* p. 328, § 26), and in the other two cases there is no writing whatever. *Id.* p. 138, § 456.—*Id.* p. 489, § 16.

But again, suppose the Court could render a judgment without any relief from the appraisement laws, in actions on demands made payable without any relief from appraisement laws, how could execution be had on them without such relief, without the aid of § 15? It could not be so had in any event; for we have seen that the practice act makes no provision for an execution of that kind. It provides for but three kinds of execution, and not a word is said about an execution without any relief from appraisement laws. See §§ 408, 411.

I have been unable to find any case wherein the objection here made has been presented for the consideration of the Court. It certainly was not raised in the case of *Reilly v. Ellsworth*, 11 Ind. R. 222. And if the Court, in the opinion in that case, state correctly the point made by the appellant, he yielded the objection made by him in its very enunciation. The Court say: "By the agreement of the defendant, judgment was rendered in favor of plaintiff for 128 dollars and 83 cents, and that the mortgage be foreclosed. The judgment was rendered waiving appraisement laws, in accordance with the note. The appellant claims that the statute authorizing judgments to be thus rendered, is unconstitutional and void. See 2 R. S. p. 123, § 381. The reason assigned is, that the subject of the act, in this respect, is not sufficiently expressed in the title.

"The title is 'an act to revise, simplify, and abridge the rules, practice, pleadings,' &c., 'in the Courts of this State,' &c. The term 'practice' extends and applies to the manner of rendering judgments, as well as to any other step in an action. There is evidently nothing in the objection." Here the appellant admitted that § 381 authorized judgments waiving relief from appraisement laws, but insisted on its being void, because the subject of the act, in this respect, is not sufficiently embraced in the title, while I insist that § 381 does not give any such authority, or if it does, it is only in one single case, where a plaintiff has included in one action, demands subject to the appraisement laws,

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with those made payable without any relief from appraisement laws, and in that case by implication only; and moreover, that if such a judgment is rendered, there is no authority to execute it without appraisement, unless there is a statute declaring that it shall be so executed; and that §§ 408, 411 of the practice act, relating to executions, make no provision for an execution without any relief from appraisement laws; and that § 15 of the act concerning promissory notes and bills of exchange, which alone makes such provision, is void.

But if the subject of § 381, of the practice act, is sufficiently embraced in the title, is it not, I respectfully submit, opposed to the very spirit and object of the act as expressed in the title?

The title is "an act to revise, simplify, and abridge the rules, practice, pleadings, and forms, in civil cases, in the Courts of this state; to abolish distinct forms of action at law; and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity." 2 R. S. p. 27.

This title is a very fair specimen of legislative accuracy and acumen. Our constitution requires the use of a rifle, which carries a single ball right to the centre of the object, but in nine cases out of ten our legislators use a shot-gun of the largest bore, and the result is, they rarely, if ever, strike the subject, but plant their shot all around and hem it in.

It might be said with much plausibility, that the subject of the practice act is the revising, simplifying, and abridging the rules, practice, pleadings, and forms in civil cases—the object or wherefore of the act, to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, in which there is to be no distinction between law and equity. But the whole might be couched in these words, and express the subject as well: An act to provide a uniform mode of pleading and practice in civil cases in the Courts of this state.

Now the term "practice" extends and applies to the manner of rendering judgment, as well as to any other step in an action. 11 Ind. R. 222. And according to the title of the act, the mode of pleading and practice is to be uniform.

But if the term "practice" extends and applies to the manner of rendering judgment, as well as to any other step in an action, must not the manner of rendering judgment be uniform? And must not the manner of executing judgment be uniform? And if it must be uniform, does it admit of any variation? Clearly not; for that which is to be uniform admits of no variety. By this I mean, that all judgments for damages alone, and all for the recovery of property, real or personal, and damages, or rents and profits, must be rendered in the same manner, and executed in the same manner. And this seems to have been the sense of the legislature in §§ 408 and 411 of the practice act. You cannot, in an act where the title declares the subject to be to provide a uniform mode of pleading and practice, provide that in one class of cases judgment shall be rendered and executed with appraisement, and in another class without appraisement; for that is to make variety instead of uniformity. And this may, in some measure, account for the failure of the legislature to provide in the practice act for an execution without any relief from the appraisement laws, and for declaring generally, when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered, without declaring in what cases a judgment should be so executed, except impliedly, in the solitary case



in § 456, that property conveyed by a debtor with intent to hinder, delay, or defraud creditors, shall be sold without appraisement; and, also, for declaring "when a plaintiff has included in one action demands subject to the appraisement laws, with demands made payable without any relief from appraisement laws, the Court may render separate judgments upon such demands," without telling us how such separate judgments might be rendered, and why, or what demands were or should be subject to appraisement, and what demands were not or should not be, or what sort of judgment might be rendered in an action on a single demand made payable without any relief from appraisement laws; or that a judgment on a demand made payable without any relief from appraisement laws, or a judgment without any such relief should be so executed. What is there then to sustain the practice? Nothing but the fact of its having existed by sufferance since the taking effect of the statutes of 1852; for that it is vicious and void there cannot be a doubt.

And the question not having been presented for the decision of this Court, it was unnecessary for the Court to anticipate. Indeed, this Court only decides the points made in the particular case.

It cannot be expected that this or any other Court will, of its own volition, raise questions and pass upon them. If, therefore, a vicious practice is submitted to by the people, or if a statute which is void is acted upon, and suffered to be enforced, without their questioning its validity, it is their fault and not that of the Court. Courts only enforce or protect legal rights when appealed to, and in the particular in which redress or protection is sought, or it is complained that legal right is infringed.

If, then, a practice which is vicious, or a statute which is void, be submitted to and acquiesced in for a time, is it any the less the duty of the Court, because of that temporary submission and acquiescence, to declare such practice or statute void, when the question is properly presented for the decision of the Court? It cannot be. It is the duty of the Court to decide the law, and not to weigh expediencies or to look at consequences; for the moment the latter is done, the Court becomes a legislative instead of a judicial tribunal.

It is true that in questions of doubt Courts do often consider effects; but where there is and can be no doubt, as there cannot be in this case, of the invalidity of the law and practice in question, there is no room for such considerations. And even in questions of doubt, the practice can scarcely be justified, especially in the decision of constitutional questions; for the well established rule of this Court as to such questions is, that if the constitutionality of a statute is questioned, and there is any doubt as to its unconstitutionality, it will be sustained. 4 Ind. R. 442.—7 *id.* 326, 332.

This question should be decided on the same principle and in the same manner as if it had been made, and come up before this Court for decision, the very day on which the statutes took effect, as a naked question of law, unbiased by any of those considerations of expediency or effects, which influence the mind and acts of the legislator. I trust the Court will not consider this allusion to rules so plain, obvious, and elementary, as improper, or made with the least intention or desire to dictate; for it has been prompted by no such feeling.

Is the objection here made to the law purporting to authorize the rendition of judgments, and their execution without any relief from appraisement laws, on promissory notes and other instruments of writing, made payable without

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any such relief, a valid objection? If it is, let the sentence of nullity be pronounced on that law, so that it may no longer encumber the statute book, and be a standing lie to equality and uniformity; for its operation has been unequal and oppressive; it has been a trap for the needy and unwary debtor, and a miraculous fall of manna for the speculator in sheriffs' sales, who feels no sympathy for the misfortunes of others, but rather welcomes them as glorious opportunities.

14 564  
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### BLACKLEACH and Wife v. HARVEY.

Section 18 of the act regulating descents, &c., should not be so construed as to prevent a widow who marries a second or subsequent time, from directing which of two pieces of land shall be sold on execution to pay a debt which must be paid by the sale, independent of her consent, of one or the other. *It seems*, that that section should only be applied in restraint of the right of the wife to convey her real estate in fee simple, while she has children living by a former husband who might inherit it.

Thursday,  
June 14.

APPEAL from the *Wayne* Court of Common Pleas.

PERKINS, J.—Suit for partition. Judgment for the defendant.

It appears by the record that during the lifetime of one *Mallory Norman*, a judgment was obtained against him in the *Wayne* Circuit Court, by one *Ephraim Cate*; that *Norman* died in 1855; that he left no children, but only his wife, *Franconia*, and his mother, as his heirs; that *Franconia* administered on his estate; that the judgment of *Cate* was revived against her; that the judgment was rendered upon a note given for a part of the purchase-money of a lot of ground in *Centreville, Wayne* county, *Indiana*; that execution was issued upon the judgment; and that, when the officer was about to sell the lot, for the purchase-money of which the note was given, *Franconia* desired the officer to sell a different lot, upon which the judgment was also a lien (the lot belonging to *Norman's* estate); that the officer consented; that *Franconia* stood by, approving the sale of this latter lot for the purpose of paying the judgment in full and saving the other lot mentioned; that the fee simple

of the entire lot was offered, and bid off in good faith by the purchaser, and paid for; that *Franconia*, before the sale, had married Mr. *Blackleach*; and that, afterwards, *Franconia* and her said husband, *Blackleach*, executed a quitclaim deed to the purchaser of the lot at sheriff's sale, of all interest therein.

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This quitclaim deed was held below to be a bar to the application of *Franconia* and *Blackleach*, her husband, for the partition of said lot.

It is insisted that the decision was erroneous under 2 R. S. p. 250, § 18, which provides that "if a widow shall marry a second or subsequent time, holding real estate by virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate; and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be."

It has already been intimated in a former opinion, that the object of that section, and others, of the law of descents, was to preserve and transmit the estate to the children of the prior marriage. *Ogle v. Stoops*, 11 Ind. R. 380, and cases cited. It could not be to protect the widow, or wife, from encroachment on the part of her husband; for the law allows first wives to convey their property with the consent of their husbands (*Reese v. Cochran*, 10 Ind. R. 195); and, beyond doubt, first wives need as much protection from the influence of their husbands as do second.

This being so, it would seem that § 18, above quoted, should only be applied in restraint of the right of the wife to convey, in fee simple, her real estate, while she had children living by a former husband who might inherit it. It would certainly operate very hardly in many cases, to give the statute a literal construction. Suppose the case of a mortgage which an estate is unable to pay off out of the personal assets, but which, could the widow, then a second wife, be permitted to quitclaim her equity of redemption in the mortgaged property, might be settled without the

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expense of a foreclosure; why should she not be permitted to do it? We incline to think the section should be thus construed; but, however this may be, we are clear that it should not be so construed as to prevent the widow wife from directing which of two pieces of property shall be sold by an officer to pay a debt which must be paid by the sale, independent of her consent, of one or the other.

We are of opinion, therefore, that the facts of the case, independent of the deed, present a good bar by estoppel *in pais*; that the judgment below was consequently right and should be affirmed. See the cases cited in the Ind. Dig., pp. 406, 420; also, *Ellis v. Diddy*, 1 Ind. R. 561; and *Whitehead v. Cummins*, 2 *id.* 58.

The statute of *Gloucester* prohibited the alienation, by the widow, of the estate assigned to her as dower; but it was held that an alienation for life simply, being no more than her interest, as it worked no wrong to her heirs, was not within the statute. See Book 2, Blacks. Comm., Shars. Ed., p. 137, and note 26.

*Per Curiam*.—The judgment is affirmed with costs.

*J. S. Newman, J. P. Siddall, and N. H. Johnson*, for the appellants.

*O. P. Morton and J. F. Kibbey*, for the appellee.

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### BLAKE v. HEDGES.\*

A contract for 250 cords of "good, merchantable wood" is complied with by the delivery of 250 cords of wood of a quality, taking the whole lot together, such as is generally sold in the market.

If the jury, in a suit to enforce a contract, find for the defendant, they indirectly find that he has complied with the contract on his part, and that he has not consented to a rescission.

If in a suit upon a contract for the delivery of a merchantable article, the defendant prove delivery at the time, &c., and it be not shown that he afterwards

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\*A petition for a rehearing of this case was overruled.

sold the article to a third person, or appropriated it to his own use, or that he otherwise agreed to a rescission, a rescission is not established; and if the contract in such case be not rescinded, and the defendant be not in fault, the plaintiff cannot recover money advanced.

To defeat such a suit, it need not be shown that the defendant set the article apart, and abandoned it to the plaintiff, or kept it delivered up to the time of suit; though it might, perhaps, be necessary to enable the defendant to recover the price of the article.

Where the evidence is in the record, it may control the judgment without regard to irrelevant instructions.

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v.  
HEDGES.

APPEAL from the *Vigo* Court of Common Pleas.

Thursday,  
June 14.

PERKINS, J.—Suit by *Blake* against *Hedges* upon a written instrument reading thus:

“*Terre Haute*, October 4, 1856. I do hereby certify that I have promised to deliver, on the bank of the canal, within six miles of this place, two hundred and fifty cords of good, merchantable wood, to *Joseph H. Blake*; and I hereby acknowledge the receipt of fifty dollars (50) on said wood. The balance to be paid when wood received by said *Blake*, all at the rate of one dollar and seventy-five cents per cord. The wood is to be on the bank within three weeks from this time. *Simeon Hedges*.”

The complaint is composed of two paragraphs; one for damages for failure to deliver the wood; the other to recover back the 50 dollars paid.

The complaint avers that the plaintiff has always been ready and willing to receive and pay for the wood according to the contract.

No point is made in the case as to who had the election of designating the point on the canal at which the wood was to be delivered.

The defendant answered, that he did, within three weeks, deliver upon the bank of the canal, six miles from *Terre Haute*, two hundred and fifty cords of good, merchantable wood, and that the plaintiff failed to pay for the same, wherefore he claims judgment for 375 dollars, the balance due for the wood.

He further answers alleging the delivery of the wood according to contract, and the refusal of the plaintiff to receive the same.

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The plaintiff replied in denial of the answers.

The cause was tried by a jury. The Court gave the opening and close to the defendant; but it does not appear that the plaintiff excepted at the time. Verdict and judgment for the defendant.

The evidence is all upon the record. It shows that *Hedges* delivered the quantity of wood within the time, and that *Blake* refused to receive it because of its inferior quality. He said it was not merchantable.

The evidence on this latter point, that is, the quality of the wood, is conflicting.

The Court instructed the jury that "the term good, merchantable wood, only means that the whole lot of wood taken together should be such as is generally sold in the market, and not that every stick should be of the best quality."

We think, as applied to the evidence in the case, in connection with the contract, this instruction expressed the fair, legal import of the agreement.

The jury, by finding for the defendant, indirectly found that he had complied with the contract on his part, and that he had not consented to its rescission. We do not think the evidence establishes a rescission. It does not appear that the defendant has sold the wood delivered under the contract to any third person, or in any way appropriated it to his own use; nor that he has agreed otherwise to a rescission. See *Patterson v. Coats*, 8 Blackf. 500.

If the contract had not been rescinded, and the defendant was not in fault, the plaintiff could not recover back the 50 dollars he had advanced on the wood.

Nor do we decide now that the answer of the defendant was sufficient to enable him, in this action, to recover the balance of the price of the wood; because, to have been so, it may have been necessary that it should show that he delivered the wood according to the contract, and that he kept it delivered, so far as he was concerned, up to the time of the suit in which he seeks to recover for it. He does not show, in his answer, that he set the wood apart upon the canal, and abandoned it to the plaintiff in this suit. It

was not necessary for him to do this to defend against the plaintiff's suit. Perhaps it was necessary for him to do this, in order to maintain a suit for the recovery of the price of the wood, on his part, against the plaintiff. See *Johnson v. Baird*, 3 Blackf. 153, 182.

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v.  
PORT.

The Court instructed the jury that, if the plaintiff was unable or unwilling to pay for the wood at the time specified, it excused the defendant from the delivery.

Of this instruction we will only say, it was entirely irrelevant to the case as made by the evidence, and could not have influenced its decision; because the evidence is clear that the wood was all delivered upon the contract, and there is no evidence that the plaintiff was not able and willing to pay. The only matter of dispute was the quality of the wood delivered. Where the evidence in the cause is upon the record, it may control the judgment without regard to irrelevant instructions.

*Per Curiam*.—The judgment is affirmed with costs.

*S. Claypool*, for the appellant.

*J. P. Baird*, for the appellee.

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WILLIAMS v. PORT.

Argumentativeness is no cause of demurrer; but a motion to strike out a paragraph of an answer containing an argumentative denial, as amounting to the general denial, may be sustained.

The case between the same parties, 6 Ind. R. 219, followed.

APPEAL from the *Fayette* Circuit Court.

Thursday,  
June 14.

PERKINS, J.—This is the third appearance of this cause in the Supreme Court. *Port v. Williams*, 6 Ind. R. 219.—*Williams v. Port*, 9 id. 551.

The action is by *Williams* against *Port*, to recover damages from the latter for representing, in the sale of his farm to *Williams*, that it contained four hundred acres, or

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thereabouts, of land under cultivation, when, in fact, it contained but three hundred and ten acres.

The defendant answered by a general denial of the complaint, and by special paragraphs setting out a state of facts which, if true, would show the complaint to be false; as that the plaintiff, *Williams*, at the time of the contract, examined the farm, estimated for himself, in company with *Port*, and upon *data* furnished by *Port*, the quantity of cultivated land, made it about three hundred acres, and purchased upon his own estimate, &c.; facts constituting an argumentative denial of the complaint.

To these paragraphs there was a demurrer overruled. This was right. Argumentativeness is not a cause of demurrer; and as the paragraphs contained facts amounting to a denial of the truth of the complaint—facts amounting to a good bar to the action, though they were facts which might and should have been proved under the general denial—the Court did right in overruling the demurrer; when, had a motion to strike out the paragraphs, as amounting to the general denial, been made, it might have been sustained.

The Court gave the cause to the jury, upon the trial, under clear and correct instructions; indeed, the counsel for the appellant does not attempt to point out a single error in them, and they covered all the ground upon which the cause rested. The jury found, under them, for the defendant. But were the instructions wrong, we have already decided that the plaintiff could not recover upon the evidence. *Port v. Williams*, 6 Ind. *supra*. There is no material difference between the facts then and now.

*Per Curiam*.—The judgment is affirmed with costs.

*N. Trusler*, for the appellant.

*B. F. Claypool* and *J. S. Reid*, for the appellee.



MEIKEL and Others *v.* COTTRELL and Another.—Two Cases.

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YOUNG  
*v.*  
MOODY.

THE SAME *v.* HUNTER.

APPEAL from the *Marion* Court of Common Pleas.

Thursday,  
August 23.

*Per Curiam.*—No exception was taken in this case. The record raises no question.

The judgment is affirmed with 5 per cent. damages and costs.

*R. L. Walpole, K. Ferguson, and J. T. Roberts*, for the appellants.

*G. Tanner and B. K. Elliott*, for the appellees.

YOUNG and Another *v.* MOODY and Others.

APPEAL from the *Jasper* Court of Common Pleas.

Thursday,  
August 23.

*Davis, Moody & Co.* brought suit on a promissory note against *Young* and another, filing a formal complaint. The record further shows that "*Hopkins*, an attorney of this Court, comes and files an affidavit and warrant to confess judgment in this behalf, which reads as follows, to-wit." The power of attorney, with the affidavit required by the statute, is then set out in the record, and is in all respects perfect. It does not appear that after proving the warrant, *Hopkins* made a formal confession of judgment; but the Court computed the interest on the note, and rendered judgment.

*Per Curiam.*—The defendant made no exception—took no steps whatever to have the error, if there were any, corrected or brought to the attention of the Court in any way. No motion for a new trial, or to correct error. The record presents no question.

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THE STATE  
v.  
WARNER.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

— *Lee* and *G. W. Spitler*, for the appellants.

*J. E. McDonald* and *A. L. Roache*, for the appellees.

DAVIS and Another v. JENKINS.

Thursday,  
August 23.

APPEAL from the *Marion* Court of Common Pleas.

*Per Curiam.*—The only error assigned is that no bill of particulars was filed with the complaint. There was no demurrer; no regular motion for a new trial. The suit is for work and labor, and the complaint contains in the body of it a statement of the kind of service, and time for which compensation is claimed. Under the circumstances, this is sufficient.

The judgment is affirmed with 10 per cent. damages and costs.

*D. M. Donald* and *C. M. Walker*, for the appellants.

*J. Coburn*, for the appellee.

THE STATE v. WARNER.

An acquittal upon an indictment for burglary with intent to commit a larceny, does not embrace an acquittal of the larceny.

Thursday,  
August 23.

APPEAL from the *Jasper* Circuit Court.

*Per Curiam.*—Indictment for larceny. Plea, former acquittal. Demurrer to the plea overruled. Judgment for the defendant.

The plea set up that the defendant had been indicted for burglary with intent to commit a larceny; had been

tried and acquitted; and that said indictment was upon the same identical transaction as the pending indictment. May Term,  
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Upon an indictment for burglary with intent to commit a larceny, the defendant could not be convicted of the larceny, if it had been committed, though he were acquitted of the burglary. WHEELER  
v.  
THE STATE.

Such being the case, it would seem to follow that an acquittal upon an indictment for burglary with intent to commit a larceny, could not embrace an acquittal of the larceny (1).

The judgment is reversed with costs. Cause remanded, &c.

*J. L. Miller, J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

(1) The true test, to determine whether the plea of *autrefois acquit* or *autrefois convict*, is a good bar, is, whether the crimes, as charged in the indictments, are so far distinct that evidence which would sustain the one, would not sustain the other. 1 Archb. Cr. Pr. and Pl. 112, n. 2, 6th ed., *passim*.—1 Bish. Cr. L., § 680 a.—1 Russ. on Crimes, pp. 829 to 832.

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### WHEELER v. THE STATE.

APPEAL from the *Marshall* Court of Common Pleas. Thursday,  
August 23.

*Per Curiam*.—In this case the cause was continued one term on the mere motion of the prosecuting attorney, without giving the defendant a hearing, he being at the time confined in jail, and not brought into Court nor consulted as to the continuance. We are not aware that such practice has ever been held correct.

Again; on the trial the witnesses were allowed to give in evidence the declarations of the person upon whom the offense, for which the prosecution was instituted, was committed, as to the transaction, and that he thought it was committed by the defendant. These declarations were made sometime after the act done, and were not dying declarations.

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JOHNSON  
v.  
THE STATE.

The judgment is reversed; prisoner to be remanded for a new trial; warden of prison to be notified.

*J. F. Miller* and *W. G. George*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

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JOHNSON and Another v. THE STATE.

Thursday,  
August 23.

APPEAL from the *Wayne* Court of Common Pleas.

*Per Curiam*.—At the time *Lawrence v. The State*, 10 Ind. R. 453, was tried, the Court of Common Pleas had jurisdiction only of misdemeanors; and in that class of offenses, a separate trial was not a matter of right. It was a matter of right on the trial of felonies in the Circuit Court. In that Court all trials were upon indictment.

But by the act of 1859 (Laws of 1859, pp. 94, 95), the Common Pleas is vested with jurisdiction, in certain cases, of felonies. They are to be tried upon informations; but the trial is to be subject to all the incidents that might attend it in the Circuit Court. One of those incidents, in that Court, would be a separate trial, if demanded, to be granted as a matter of right. The separate trial should have been allowed.

The judgment is reversed, the cause remanded for a separate trial, and the keeper of the state prison to be notified to bring up the prisoners.

*A. L. Roache* and *T. D.* and *R. L. Walpole*, for the appellants.

*J. E. McDonald*, Attorney General, for the State.

## ROWLAND v. THE STATE.

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v.  
THE STATE.

Upon an indictment against *A.* and two others unknown, for an assault and battery with intent to rob, the state was permitted to prove that during the afternoon and evening preceding the assault, which was about nine o'clock at night, the defendant and *B.* and *C.* were seen together, and that upon these persons being brought into the presence of the prosecuting witness next day, defendant and *B.* were partially recognized, as two who were present, engaged in the crime; but the principal witness did not implicate nor mention *B.* or *C.* The defendant having shown that *B.* and *C.* went to their room at half after eight o'clock, offered to prove that *B.* was in bed at the time of the assault, &c. *Held*, that this evidence should have been heard.

If misconduct of the jury, in suffering outside rumor to influence their verdict, be assigned as error, it must appear that the rumor was known to the jury at the time their verdict was agreed upon.

APPEAL from the *Vanderburgh* Circuit Court.

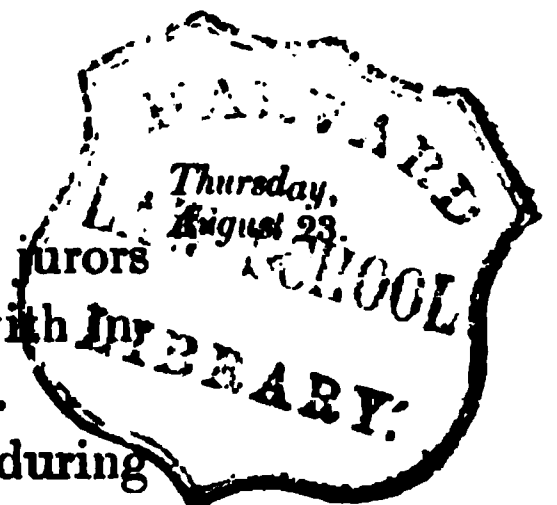
HANNA, J.—The appellant and two others, to the jurors unknown, were indicted for an assault and battery with intent to rob. The appellant was tried and convicted.

On the trial evidence was given by the state, that during the afternoon and evening preceding the time when the offense was committed, which was about nine o'clock at night, the defendant and two persons named *Roberts* and *Willis* were seen together; and that, on the next day afterwards, upon said three persons being brought into the presence of the prosecuting witness, the defendant and *Roberts* were by him partially recognized, as two that were present, engaged in the crime.

This principal witness, in his testimony, does not implicate either *Roberts* or *Willis*, nor, indeed, in any manner mention them.

The defendant, having shown that about half after eight o'clock *Roberts* and *Willis* retired to their room at the hotel, then offered to prove by the same witness, that *Roberts* was in bed at the time of the commission of the crime. Upon the objection of the state the evidence was not admitted. Was this ruling correct?

We are not able to say what effect, if any, it had upon the verdict of the jury. Perhaps the introduction, by the



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state, of the statements of the witness, the injured man, was improper; but as they were thus introduced, without objection, that fact, together with the other evidence, of the defendant and the other two persons having been seen in company, was such as might tend to produce the impression upon the mind of the jury that they committed the offense. The evidence should have been heard.

One of the reasons assigned for a new trial was, misconduct of the jury, in this, in suffering a report, that defendant had but recently come out of a penitentiary, to influence their decision. In support of this was the affidavit of defendant, that he was informed that one *Hughes*, a jurymen, had been so influenced; and, also, the affidavit of one *Sherwood*, to the effect that, upon his expressing to *Hughes* his belief that the verdict was pretty hard, on the evidence, *Hughes* remarked that "the fact that the defendant came here right out of a penitentiary, taken in connection with the circumstances, showed that he ought to have been convicted." Upon inquiry by affiant, as to how he knew that fact, *Hughes* replied that "such was the report."

We think this falls short of showing that the report was known to the jury at the time the verdict was agreed upon, and operated upon, or in any manner controlled them in their decision.

*Per Curiam*.—The judgment is reversed, with instructions, &c., to the keeper, &c.

*C. Denby*, for the appellant.

*J. E. McDonald*, Attorney General, and *A. L. Roache*, for the state.

#### MATLOCK and Wife v. TAYLOR.

Thursday,  
August 23.

APPEAL from the *Putnam* Court of Common Pleas.

*Per Curiam*.—Suit on notes and to foreclose a mortgage. Judgment by default for plaintiff.

Two points are presented; first, that the Court erred in setting aside a judgment by default rendered against the plaintiff; and, second, in rendering the judgment in the form in which it is entered against the appellants.

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The appellants, so far as the record shows, made no motion in the Court below in reference to the judgment taken against them by default. *Harlan v. Edwards*, 13 Ind. R. 430. But we have looked into the record and see no error.

The judgment is affirmed with 5 per cent. damages and costs.

*J. L. Ketcham, C. C. Nave, and J. Witherow*, for the appellants.

*C. T. Patten*, for the appellee.

### HELTON and Others v. MILLER and Others.

The convicts in the state prison, other than those sent to *Michigan City* under the act of 1859, cannot, under existing statutes, be worked outside the prison and the adjoining state grounds.

If a cause of complaint for working them elsewhere, arise in *Clark* county, the *Floyd* Circuit Court has no jurisdiction in the suit.

#### APPEAL from the *Floyd* Circuit Court.

Thursday,  
August 23.

PERKINS, J.—*William Helton*, and three other persons, applied to the *Floyd* Circuit Court for a mandate to the warden and directors of the state prison at *Jeffersonville*, commanding them to withdraw the convicts belonging to said prison from the surrounding cities and country, where they were hired out to labor, and to confine them within the prison limits.

It is alleged that a part of the convicts are employed in a brick-yard near the prison, and a part among the community at remote distances from it; that the brick-yard adjoining the prison is upon the ten acre tract of ground purchased and owned by the state for prison purposes, which ground is enclosed by a common board fence, with

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suitable guard-houses, and that bricks have been made there by the convicts, a fact of general notoriety, for the last fifteen years.

The whole number of convicts belonging to the prison is five hundred and seventy-six, of which number but two hundred and twenty-three have found work inside the state's inclosure. The shops belonging to the prison will only accommodate two hundred and seventy-five laborers, and there is room to erect no more shops. There are but three hundred and forty-three single cells, and there is no building or inclosure within the walls where idle men can be kept during the day, especially in summer, without great danger of sickness and insurrection, nor is there any room for the erection of such building or inclosure. The cost of feeding and clothing each convict is  $31\frac{1}{2}$  cents per day, and the prison has no income but the proceeds of convict labor. The convicts have been publicly and notoriously worked outside of the prison bounds for the last fifteen or twenty years. They are worked under guards, returned and locked up in the prison at night, have the same opportunities for receiving instruction and medical treatment as though worked inside, &c. Such is a full statement of the facts of the case; and upon it counsel on both sides have furnished very able and thorough arguments.

The ground on which the mandate was asked is, that the law does not allow the working of convicts beyond the prison limits; that it is injurious to citizen laborers with whom they come in contact, and competition; and that the presence of the convicts is offensive and demoralizing to the community among whom they are permitted to mingle as laborers.

The disposition to be made of convicted criminals—the treatment that should be meted out to them—has presented a uniformly embarrassing question to government, since the time when *Howard*, the philanthropist, aroused public attention to the subject by publishing the results of his explorations of the “mansions of sorrow and pain,” in which such criminals were confined by the governments of *Europe*.



Transportation, solitary confinement, silent labor, and social labor, have all been tried, but without satisfactory results, in the punishment of convicts.

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Later has sprung up the idea of reform of the convict, *pari passu*, with punishment and profit through his labor.

In the present state of society and condition of things, it is to be feared this latter idea will fail of realization but to a very limited extent; the buddings of reform, commenced in prison, if, indeed, they are commenced, will not be protected and fostered till they shall blossom in the convict free, but will be withered and blighted by the chill of neglect and scorn which will greet him on his return to the community. He will not be received into respectable society. Confidence will not be extended to him. Employment will not be given to him by respectable men, for respectable men will not labor in company with him. And we have no penitentiary-convict-employment societies to step forward and receive him in their embraces. He becomes, therefore, almost necessarily an *Ishmaelite*, his hand against every man in community. He resumes his marauds. He inveigles and seduces others, especially of the young, into his schemes and his overt acts of crime; and in a little while he leads back a sad company from sadder homes to experience the reforming influences of the state prison. Thus it is that every discharged convict becomes but a mere recruiting officer for the penitentiary; and such convicts are issuing from it and overflowing upon the community in an incessant stream.

In view of these facts the writer of this opinion would hold, that a part of the policy of punishment for infamous crime, committed under circumstances indicating great moral turpitude, should be the removal, and forever, of the polluted criminal from society, that it might, in future, be saved from his contaminating touch; and to this end he would have but two measures of punishment for this class of crimes, to-wit, capital and imprisonment for life. No man should ever be permitted to return from the penitentiary—a man of depravity—to prey upon the community, or demoralize it by contact. Lesser offenses, and such as do

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From what has been said it will be manifest that if the statute of the state does authorize the working of penitentiary convicts outside of the prison limits, and among the community, the statute is a bad one, considered as a permanent regulation. Such working for a temporary object, as the erection of a public building by the state, might be tolerated. But as a permanent measure of policy, the state should, in our judgment, provide herself with grounds and buildings sufficiently extensive to accommodate at work and at repose all her convicts.

But the question submitted to us is, not what the law should be, but what it is; and if the legislature has seen fit to authorize the working of the convicts outside of the prison bounds, no one, save the convicts themselves, can, we take it, dispute the validity of the law, and refuse to obey it while it remains upon the statute book; and as such working would undoubtedly be held a mitigation rather than an aggravation of the punishment of the convicts, they could not withhold obedience to the law. *Strong v. The State*, 1 Blackf. 193.

Does, then, the statute law of this state authorize the working of penitentiary convicts outside of the prison limits?

The code of 1852 provides, as the general rule, that when any person is convicted of a felony, he "shall be imprisoned in the state prison" for the time he is to undergo punishment. 2 R. S. p. 396, *et seq.*

Such has been the law since the organization of the government; and by 2 R. S. p. 424, § 59, it is enacted that "whenever any person is imprisoned in the state prison, he or she shall be kept at hard labor therein, during the period for which such person was sentenced."

These provisions not only do not allow, they in effect forbid, the working of the convicts outside of the prison limits.

We have found no subsequent statute that permits such

working of the convicts, except for some special temporary purpose named in the statute (but we have found those that expressly forbid it), till we come to the act of 1857. Does that act depart from the line of previous legislation, and from what, in our judgment, is sound public policy?

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All the sections of that act except two clearly harmonize with previous legislation on the subject. Two of those sections create some doubt. One of them, viz., § 22, is this:

“It shall be lawful for the directors, if in their opinion justice and good faith require it, to continue the existing contracts for the hire of the convicts, with the present contractors, for a period not exceeding four years from and after the first day of *June*, 1857.”

It is not shown, in this case, that any of those “existing contracts” involved the removal of the convicts beyond the prison limits, and, hence, the section is perfectly consistent with the close labor practice. Had it been shown that “existing contracts” for outside labor were recognized by the legislature, a different view of the section might have been taken.

The other section referred to is this:

“Sec. 10. The convicts may be levied [or hired] in any number not exceeding one hundred in any one contract, in such manner as the directors, in their judgment, may consider to be most conducive to the interests of the state. All contracts for working convicts shall be given to the highest and best responsible bidder. The directors shall cause such notice to be given by publication, of the time and place of letting to hire said convicts, as they may deem most beneficial to the state. All contractors shall be required to give security to the state for the faithful performance of their contracts, in such amount as the directors, in their judgment, may think proper. In allotting convicts whose labor is thus contracted for, the warden shall do it in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be most conducive to his [their] interests after his [their] discharge.” Acts of 1857, p. 103.

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Now, this section does not, in terms, authorize the contracting of the convicts to labor outside of the prison bounds; and when we proceed to the question of construction, we are bound to harmonize it with other legislation on the subject, if it can reasonably be harmonized. We must construe it in connection with the previous section quoted, providing that convicts shall be kept at labor in the prison. There is no difficulty in reconciling the two provisions. The commissioners can hire out the convicts at their discretion within the prison bounds. We may observe here that we do not mean by prison limits the space enclosed by the walls of the prison. We think they may properly be defined to include that space, and also the secret enclosure around the prison, be it larger or smaller, which is owned by the state, and appropriated to the uses of the prison. The prisoners, in such enclosure, can be kept separate and secluded from the community at large, and may, while thus kept, be regarded as in prison.

We think the prisoners cannot, under the present statutes, be worked outside of the state grounds adjoining the prison, except such as are taken to *Michigan City* under the act of 1859.

But, as the cause of complaint arose in *Clark* county, we do not think the *Floyd* Circuit Court had jurisdiction of the suit, and, hence, the judgment below dismissing it, is affirmed with costs.

*Per Curiam*.—The judgment is affirmed with costs.

*R. Crawford*, for the appellants (1).

*J. H. Stotsenberg* and *T. M. Brown*, for the appellees (2).

(1) Mr. *Crawford* submitted the following argument:

The superintendents of the state prison during their time, and since then the warden, have been in the habit of working more or less of the convicts outside of the prison walls. They required them to make bricks, and haul and carry and lay them; to work on roads, cut cord-wood, do harvesting, and most kinds of farm and common labor; sometimes near the prison, and often several, and occasionally many, miles from it; generally under the care of one or more persons, but frequently single ones or a small number wholly unattended. They were worked at under prices, and the competition thus produced was greatly injurious to the common laborers. The passing and repassing, several times a day, of gangs of felons and desperadoes, whether guarded with loaded

muskets and revolvers, or unguarded, along the public streets of *Jeffersonville*, and the highways adjacent to it, was shocking to every good citizen, dangerous to the public peace, and pernicious to the public morals. The evil had recently been much aggravated by the increased number of convicts. The citizens held public meetings, and repeatedly requested that the prisoners should be confined within the prison. Their requests were unheeded. It is not strange, therefore, that they recently rose, *en masse*, and drove all the prisoners and their keepers back to the prison, declaring they would no longer submit to so intolerable a nuisance.

An armistice was then agreed upon. The convicts were not to be worked outside of the prison, except upon the land of the state immediately adjoining, until the question, as to the right to work them out, should be decided by this Court; and an action was to be commenced so as to obtain such a decision as early as practicable.

This action was accordingly brought in the *Floyd* Circuit Court, in order to obtain a speedier determination. The defendants entered their appearance to it, agreeing to waive all objection to the jurisdiction of the Court, which might exist because the suit had not been brought in the county where the prison is. The complaint alleges the defendants were, at the time, the warden and directors of the prison; that the prisoners had been worked out of it, around the city and country as aforesaid; and that the defendants would continue so to work them if not restrained by the Court; that the plaintiffs were workmen at similar kinds of business, living in the neighborhood of the prison, and had been materially injured by the defendants' wrongful conduct; and prays for a writ of mandate to be issued, requiring the defendants to confine the convicts within the prison walls. An affidavit was annexed, that the complaint was true, the controversy real, and the proceedings in good faith. The defendants demurred to the complaint, as not stating facts sufficient to constitute a cause of action. The Court held the defendants had no right to work the convicts out of the prison, and that the plaintiffs were entitled to the relief prayed for, but that the *Floyd* Circuit Court could not issue a writ of mandate to operate in *Clark* county, and for that reason only was the demurrer sustained. The plaintiffs excepted and appealed.

We believe both parties desire the direct and full opinion of the Supreme Court, whether the defendants or the warden have a lawful right to work the convicts outside of the prison walls; or if they have, then to what extent and under what circumstances. This is the only question in the case really important to the parties; any others that are involved and may be discussed, are comparatively immaterial. If this Court decides it is the duty of the defendants to keep the convicts wholly within the prison, we doubt not the decision will be obeyed, whatever may be the determination on the further questions, whether a mandamus is the proper remedy, and whether the *Floyd* Circuit Court can issue it.

*First.* The defendants have no right to work the convicts outside of the prison.

1. The state, at large expense, has provided the prison. Its lofty walls, enclosing several acres of ground, are utterly useless and unmeaning, if not intended for enclosing and securely keeping the prisoners committed there. The statutes, uniformly and in express words, require that all convicts to the penitentiary shall be imprisoned in the state prison (2 R. S. p. 396, §§ 4, 5, 7, et

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*passim*); and that whenever any person is imprisoned in the state prison, he shall be kept at hard labor therein, during the period for which such person was sentenced. 2 R. S. p. 424, § 59. So far the meaning is perfectly clear. There is no room for construction. The form of the prison, and the words of the statute, taken by themselves, require the convicts to be confined within the prison walls, and they admit no other meaning.

2. Is there then any other law which controls this obvious meaning, and gives the defendants a discretion to keep the prisoners within or without the walls at their pleasure?

All prior statutes for the government and discipline of the prison are repealed, and that of 1857 gives all the powers, and prescribes all the duties of the defendants, except the provisions already quoted (R. S. 1857, p. 103). We will examine all its enactments on this point.

Section 2 provides that no person "who is a contractor in the penitentiary" shall be a director. This evidently means, not every one who may have made a contract when within the prison walls, but one who has a contract to work convicts in the penitentiary, no matter where it was made.

Section 5 requires a physician to be appointed, whose duty it shall be to "visit the prison at least once each day." Of course he should visit where the prisoners are to be kept. But convicts working in the country are liable to fall sick there, yet the physician is required to attend at the prison only, and there is no provision for those sick elsewhere.

Section 7 provides that a moral instructor shall be appointed, "who shall reside near the penitentiary, and devote his whole time and ability to the interests of the convicts confined therein." But if part of them are not to be confined therein, they are deprived of the benefit of his instructions, and so far the means of reformation are thrown away.

By § 9 the directors are to attend at the prison, and inspect its different departments and the condition of the prisoners, and hear and examine into the complaints of any of them. But how can they examine into the condition of the prisoners, or hear their complaints, when they are at work in the country?

By § 10 "the convicts may be hired in any number not exceeding one hundred in any one contract, in such manner as the directors may consider most conducive to the interests of the state."

By § 13 the warden is to attend to the purchase "of all articles for the institution, clothing, provisions, medicines, materials for building and repairs; said materials to be manufactured in the penitentiary."

By § 15 all convicts are to be kept at hard labor, "in such manner as the warden shall deem most advantageous to the state," and under such rules as the directors shall prescribe.

By § 22 the directors may, in their discretion, "continue the existing contracts for the hire of the convicts with the present contractors," not exceeding four years from June 1, 1857. As the prior law forbade the working of the convicts out of the prison, this Court will not presume any contracts were made for such illegal purpose. And it will not be pretended by the defendants there were any such contracts in force, within the time covered by the complaint. This matter is entirely aside from the main questions which both parties wish decided.

Now, the provisions of §§ 2, 5, 7, 9, and 13 all tend, and some of them tend

strongly, to maintain the proposition, that the defendants are required to confine the convicts within the prison, and, therefore, they are arguments in favor of the plaintiffs, and not against them. And there is nothing in the letter or the spirit of §§ 10 and 15 at all inconsistent with the former enactments, that the convicts should be "imprisoned in the prison." It is later and inconsistent laws only that repeal former ones. Although those sections give the defendants some discretion, yet they are not to disregard all law in the exercise of it, but to exercise it according to law. Else they might hire out the convict for his whole term, to whomsoever, and to be kept wheresoever, the hirer might choose.

3. Females convicted of any crime "the punishment of which is confinement in the state prison," may, instead of such punishment, be imprisoned at hard labor in the jail of the county, under the direction of the jailor. 2 R. S. p. 423, § 57. Now will it be claimed, that the jailer has the right to keep them at work, in or out of the jail, at his uncontrollable discretion?

4. If the defendants can work the convicts outside of the prison walls, what is the limit of their power? If they can take them one rod, why not a mile, or a hundred miles? If they can work them in the city of *Jeffersonville*, why not anywhere in that county, or the state, or, indeed, out of it? No real answer can be made to these questions. For there is no law which says to the defendants, "so far you may go, but no farther;" and if we concede the power in any degree, we concede a wide, lawless, illimitable one.

5. But it has been said, in behalf of the defendants, that "whenever a convict is in the custody of the warden, he is in the state prison." If so, then the warden might proudly say of his prison, as Queen *Victoria* does of her Queen's Bench, that it is "*ubicunque fuerimus*." Or, rather, it might be said that we have carried into actual operation, the somewhat notorious invention of a former legislator, "the rolling penitentiary." And a sheriff, having a prisoner to commit, would go about inquiring, not where he could find that thing of folly at *Jeffersonville*, miscalled the penitentiary, but where, in all the state, he could find one *David W. Miller*, the real ambulatory state prison. And, of course, wherever found, being the state prison, he would be bound to let in all prisoners duly offered.

6. The practice complained of not only violates the letter, but the policy of the law. Punishment is the chief purpose of imprisonment. The very essence of punishment, and the sole use of the prison walls, is the confinement of the convict within them; his real exclusion from the rest of the world, rendering him for the time *civiliter mortuus*. Humanity indeed forbids, as unnecessary rigor, that his confinement should be absolutely solitary, or that all his natural and civil rights should be temporarily annihilated; but actual enclosure within its walls, is essential to the idea of imprisonment in the penitentiary. And punishment there would be stripped of its chief terror, if the convict felt that he might daily leave the prison and mix with his fellow men outside.

Another principal purpose of imprisonment is the total exclusion of the convicts from society. There are exceptions of course, but the great body of them are bad, and many of them excessively so; and dangerous and pernicious in the highest degree are the presence and example of men who have lost all pride and all shame; who have been guilty of, or are ready for, every kind and extent of crime; who are at war with all law, all order, all virtue, and all decency. What community of good citizens would, if they could help it, sub-

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mit to have their families and property exposed to gangs of such wretches as these, daily turned out among them, whether guarded or unguarded? And if the law gave them no remedy, would they not naturally seek to redress themselves? To all this evil have the *Jeffersonville* people been subjected by the practice complained of.

7. The defendants say they have but followed the former practice, and the legislature has tacitly sanctioned that, by not forbidding it. Neither of these propositions is correct. The defendants have not merely followed the former practice, but have aggravated the evil by working out a far greater number of convicts than their predecessors did; and the legislature, so far from having sanctioned the practice, has again and again, in express words, forbidden it.

Prior to 1821, all imprisonment prescribed by law was in the county jails. By the statute of *February 9, 1821*, a state prison was directed to be built, and all convicts to be confined at hard labor therein. The statute of *January 10, 1822*, enacted that convicts should be confined at hard labor in the state prison. The revised statutes of 1824 (p. 399, § 14), of 1831 (p. 512, § 1), of 1838 (p. 572, § 1), required the same. This last statute seems to have continued in force till repealed by 1 R. S. 1852, p. 430, § 1. The statute of 1842, p. 99, § 5, also required the convicts to be worked inside the walls of the prison, except they might be employed in the erection of the new prison (as provided in the previous sections); and a violation of this enactment, was made good cause for removal of the superintendent from office. This statute appears not to have been repealed till 1852. 1 R. S. p. 430, § 1. A statute of 1846 (*Loc. Stat. 1846, p. 36, § 4*), enacts that "the convicts of said prison shall not be employed without the walls thereof, except in immediate connection with the business prosecuted within said walls; nor shall the labor of said convicts be devoted to any pursuits, that shall interfere with the mechanical pursuits of the immediate neighborhood, but shall be devoted to the rolling of iron and other manufactures." This was continued in force by 1 R. S. 1852, p. 391, § 2, but repealed by statute of 1855, p. 201, § 22, which was itself repealed by that of 1857, p. 103, § 1. A statute of 1849, p. 140, § 1, was passed, providing that "the lessee of the state prison may hereafter employ the convicts of said prison without the walls thereof, in making bricks upon the property belonging to the state, and in chopping and hauling wood to burn such bricks, and in digging and hauling earth to make the same, from such places as may be most convenient for said lessee not on the property of the state, and in the erection of such public buildings, as may now be commenced, or may be authorized by the state hereafter to be built, adjacent to the prison, and such other purposes as may be connected with the prison proper." And, § 5, that "the lessee shall in no case employ or work the convicts out of said prison, within the corporation of the city of *Jeffersonville*, nor elsewhere, in violation of the provisions of this act." But by § 6, this act was to take effect "as soon as the lessee of said state prison shall give his consent thereto in writing, and file the same in the office of the secretary of state." This Court will officially notice what statutes come into force, and will therefore know that said lessee never did consent to said statute of 1849, and that it never took effect. It was referred to in 1 R. S. 1852, p. 391, § 2, not in a way that gave it force as a law, but as containing provisions which the lessee might still accept, and by accepting give them life and validity. The revisions of 1824, p. 124, §§ 3, 4, 5, *et passim*, and of 1831, p. 180, same sections, of 1838, p. 207, same sections, and



of 1843, p. 960, §§ 5, 6, 7, &c., all provide, like the statute now in force, that convicts sentenced to the penitentiary, should "be imprisoned at hard labor in the state prison."

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The foregoing is believed to be all the legislation on the point in question. And it is submitted that, instead of the practice complained of being authorized or excused by the former statutes, it was a violation of the express language of many, and of the whole spirit and policy of all of them.

II. The defendants say, by way of affirmative defense, that the number of convicts is greatly increased and the prison crowded; that they have diligently sought to hire more of the convicts to be worked in the prison, but without success; that the workshops and machinery are not sufficient to profitably employ all of them therein; and that thus there has been a necessity for working them out, and therefore they have the legal right to do so. This matter of defense does not arise upon the demurrer to the complaint, but both parties desire the opinion of the Supreme Court upon it, as if it had been set up in an answer, and the plaintiffs had demurred to it.

1. There may be cases of absolute necessity which make a law for themselves; as the breaking out of a highly contagious and fatal disease in the prison, or the prostration of its walls and buildings by a tornado, or the approach of an invading army, and the like. Under such circumstances, the defendants would be required to do, in good faith and with reasonable diligence, only what they should judge most proper. But no such inevitable and disastrous case has happened there. The defendants allege no necessity at all, but a matter of mere convenience and profit. As to the crowd, a ship of war accommodates one thousand men in a fiftieth part of the space these five hundred or six hundred have in the prison. The guests of our best hotels have less room for each, than these convicts have. It is conceded they all lodge in the prison, and certainly working them out by day gives them no more room within at night. As to health, if the prison is kept thoroughly clean and ventilated, there is not the slightest danger from the number of convicts; if it is not so kept, that fact alone conclusively proves, that the most important work of all is in the midst of this idle crowd, and still left undone.

2. Nothing has happened new or extraordinary. The number of prisoners has been gradually increasing, as our population has increased. The legislature, which sat a year and a half since, had the whole matter before them. It was their duty to make such changes in the law, and additions to it, as they judged the circumstances required; and they did so. They authorized a new prison to be built, and the withdrawal of one hundred and fifty convicts from the old to work on the new one. If the governor has not seen fit to take away so many as he was authorized, or to take them so soon as he might, it is very satisfactory evidence that he has not thought the crowd so great as to justify a plain violation of the existing law.

3. But the convicts cannot be worked so profitably within the prison as they can out of it, and therefore they are worked out. Such a ground of defense is, not to speak more severely of it, totally wrong. The state of *Indiana* does not inflict punishment in order to make a profit from it. It would be a disgrace to her and the age to do so. The matter of mere dollars and cents is altogether incidental. Still, if the defendants supposed it was a primary object, then it was their duty to make the most money they could by the prison.

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Therefore, why did they not act consistently, by at once hiring out each convict, for his whole term, to himself or his friends, or whomsoever would pay the most, and to go wherever the hirer chose? If they had the power to do this indirectly, and by successive hirings, they certainly had the power to do it directly by a single one, and they would have found it incomparably more profitable. But, by so doing, the great ends of punishment, the reformation of the convicts, and the protection of society against them, would have been utterly disregarded. The Court might then well say to the defendants, "ye have omitted the weightier matters of the law; these ought you to have done, and not to have left the others undone."

### III. As to the remedy.

1. A mandamus is proper "in every case where there is no other specific legal remedy for a legal right." Tapp. Mand., p. 9, marginal paging always. "If it be doubtful whether there is another effectual remedy, or the Court does not see its way clearly to one, the writ will be granted." *Id.* 19. "It is no answer to an application for a mandamus, that there is a remedy in equity." *Id.* 22. "Application to enforce an act of parliament is, for the most part, *ex debito justitiæ*." *Id.* 32. The writ will be granted to compel proceedings to elect a burgess (*id.* 54); to restore to the office of capital burgess (*id.* 56); to abate a nuisance (*id.* 171); to compel all officers of a municipal corporation to do their duties (*id.* 168); and to command judicial and ministerial officers, the first generally, the second specifically (*id.* 176). And see *The Trustees, &c. v. Johnson*, 2 Ind. R. 219; *Lewis v. Henley*, *id.* 332; *Hamilton v. The State*, 3 *id.* 552; *The State v. Custer*, 11 *id.* 210. In a matter of public concern, any citizen may be the relator. *The State v. Hamilton*, 5 Ind. R. 310. The state, where its name is used, is but a nominal party, and the action may be in the name of the person interested. *Brooker v. O'Brien*, 2 Ind. R. 423.—*Smith v. Talbott*, 11 *id.* 144.

The complaint alleges, and the demurrer admits, the plaintiffs have been materially injured in their lawful business, by the conduct of the defendants. And that conduct is shown to have been a wrongful violation of a duty, not discretionary, but imperative. It cannot be pretended the plaintiffs have any other remedy. It follows, therefore, they are entitled to a mandate.

2. Had the *Floyd* Circuit Court jurisdiction to issue such a writ in this case? The state prison is in *Clark* county, and the defendants are sued, as its officers, for a violation of official duty. The *Floyd* Circuit Court had no original jurisdiction over them as such, without their consent. 2 R. S. p. 34, § 29. But this was a personal privilege, which they could waive; they had especially agreed to waive it, and by demurring for the cause alleged, they actually waived it. Consent, by those authorized to consent, is always sufficient to give jurisdiction of the person, unless some statute forbids it. *Logan v. Patrick*, 5 Cranch, 288.—S. C. Cond. R. 259.—*Gracie v. Palmer*, 8 Wheat. 699.—S. C. Cond. R. 561.—*Paulding v. The Hud. Man. Co.*, 2 E. D. Smith, 38.

A Circuit Court is authorized to issue such writs (2 R. S. p. 197, § 738); and being a Court of general jurisdiction, and the parties submitting themselves to it, it is competent to hear and determine all the matters arising on the complaint in this action. If it had been commenced in the *Clark* Circuit Court, the power of that Court to issue the writ would be admitted. So, if it had been commenced there, and the venue then changed to the *Floyd* Circuit

Court, the power of the latter Court to try the case and issue the writ, would follow of course. So, the latter Court, after acquiring jurisdiction by consent of the parties, had the same plenary power.

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QUINN  
v.  
THE STATE.

It by no means follows, that the writ must be issued to *Clark* county. Being intended to operate on the defendants personally, it should go where it could be served on each of them, and thus made effectual. The defendants might none of them be found in *Clark*; they might be dispersed in several counties. And this writ, like other process of the Court, could be sent to any county of the state. If it were duly served and disregarded by the defendants, where should an attachment be sent? Evidently, wherever in the state a defendant could be found. The jurisdiction to try rights to lands is local, but to effectuate it, the Court can grant injunctions and attachments against a party, wherever in the state he may be. And actual service of the writ is not necessary, in case of a mandate, any more than in case of an injunction; but if a party has notice of the writ or of the order for it, and violates it, he may be attached, whatever county he is in or may flee to. 3 Dan. Pr., p. 1908.—1 Barb. Ch. Pr., 634.

(2) The brief for the appellees is lost.

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QUINN v. THE STATE.

The code has not changed the common-law rule, that the state cannot be allowed to impeach its own witness in a criminal proceeding.

It is error to permit the jury trying a criminal cause, to disperse among the people during an adjournment pending the trial, without the consent and over the objection of the defendant.

APPEAL from the *Marion* Circuit Court.

Thursday,  
August 23.

PERKINS, J.—*Patrick Quinn* was indicted and convicted of murder in the second degree.

On his trial, a boy (his son), seven years old, was examined as a witness. The Court examined him, and were satisfied of his competency. Nothing appears showing the ruling incorrect.

The boy was a witness for the state, and the state was permitted to impeach him by contradicting his statements. This is allowed in civil cases. 2 R. S. p. 83, § 244. But we have found no provision in the criminal code changing the common-law rule; and it has been decided that the provisions of the civil code do not, as matter of course,

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THE STATE.

govern in criminal practice. *Miller v. The State*, 8 Ind. R. 325, on p. 328. At common law, such a practice is not tolerated. *Thompson v. Blanchard*, 4 Comst. (N. Y.), 303.

The Court permitted the jury trying the cause to separate, and disperse themselves among the people during the adjournment of the Court, pending the trial, against the consent, and over the objection and exception of the defendant. We think this was error. The Court may permit such separation with, but not against the consent of the defendant. See *McCorkle v. The State*, at the last term (1).

*Per Curiam*.—The judgment is reversed, cause remanded for a new trial, and the clerk is instructed to notify the warden of the penitentiary accordingly.

*T. D.* and *R. L. Walpole* and *S. A. Colley*, for the appellant.

*J. E. McDonald*, Attorney General, for the state.

(1) *Ante*, 39.

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### HAYWORTH v. THE STATE.

In an information for maliciously killing horses, an allegation of the manner of the killing is surplusage.

*Quære*, whether duplicity in such an information is a ground for quashal under the code.

Where injuries to two animals are alleged to have been inflicted at the same time and place, but one offense is charged, and there is no duplicity.

If the jury, in such case, find the defendant guilty as to one animal, and say nothing as to the other, they acquit as to the latter.

Thursday,  
August 23.

APPEAL from the *Pulaski* Court of Common Pleas.

PERKINS, J.—Information against *Hayworth* for maliciously killing a horse and colt, of the value of 160 dollars, the property of, &c. It is charged that the horse was poisoned and the colt stabbed. The allegation is that both animals were injured and killed by *Hayworth*, at the

same time and place. The allegation of the manner of killing was surplusage. Ind. Dig., p. 371. A motion to quash was overruled.

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HAYWORTH  
v.  
THE STATE.

The only objection of any plausibility urged against the information is duplicity. We are not sure that duplicity would be a ground of quashal, under the code (see 2 R. S. p. 368); though it was at common law, certainly, in felonies. But in this case there was no duplicity. The injuries to the two animals were inflicted in one transaction. They constituted the one offense of malicious injury to property. See 1 Wat. Archb., p. 95—2. If by one act, a person commits an assault and battery upon two persons, it is but one offense. 1 Wat. Archb., 111—2; and 2 Wat. Graham on New Trials, p. 52, *et seq.* It is doubted if duplicity is ground for a motion in arrest at common law. Wat. Archb., *supra*, note to p. 96—1.

In larceny, it is said in a note to 4 Blacks., p. 231, that “where it is one continuing transaction, though there be several distinct asportations, in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods,” &c.

There was no motion for a new trial on written reasons filed.

The evidence is not of record.

It sufficiently appears that a lawful jury was sworn to try the issue. *French v. The State*, 12 Ind. R. 670.

The jury found the defendant guilty as to the colt, and said nothing as to the horse. This was tantamount to a verdict of acquittal as to the latter. See *Weinzorpflin v. The State*, 7 Blackf. 186. See *The State v. Slocum*, 8 *id.* 315; Ind. Dig., 688.

*Per Curiam*.—The judgment is affirmed with costs.

*D. D. Dykeman*, *J. W. Eldridge*, and *D. D. Pratt*, for the appellant.

*J. E. McDonald*, Attorney General, *A. L. Roache*, and *H. P. Biddle*, for the state.

14	599
186	90

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1860.

SMALL and Others v. HOWLAND and Others.

SMALL  
v.  
HOWLAND.

Complaint in three paragraphs to recover land—1. In the usual form. 2. Upon a title-bond, for a conveyance of a life estate, remainder to heirs, given by *A.* to his daughter *B.*, alleging that since its execution *A.* had died, and that neither he nor his heirs had conveyed; that *B.* was also dead, and the plaintiffs were her heirs. 3. Like the second, adding that, through the ignorance of *A.* and the person who prepared the bond, a mistake occurred therein by using the word *heirs* instead of the word *children*, they using the former as synonymous with the latter, and intending the latter; that *B.* was put in possession as tenant for life. Answer, 1. The general denial to the first and second paragraphs, and that *A.* did not execute the bond. 2. That *A.* did not execute the bond, minutely setting forth the facts relied on. 3. That after the death of *A.*, *B.* and her husband instituted proceedings in chancery against *A.*'s heirs, on the bond, and obtained a decree and a deed in fee (the said heirs consenting thereto as an advancement), and entered upon the land and took it as their distributive share, &c., and, whilst so in possession, mortgaged the same to *C.*, who foreclosed, and bought in the land at the sale under his decree, and *C.* sold the land to the defendant, who, not relying upon said sale as conveying any interest other than that which descended to *B.* and the wife of *C.* (who was also a daughter of *A.*), on the same day took a quitclaim deed from the other heirs of *A.*

*Held*, on demurrer to the last paragraph of the answer, that the proceedings in chancery vested the fee simple in *B.*, and consequently the plaintiffs had no title.

Thursday,  
August 23.

APPEAL from the *Marion* Circuit Court.

*Per Curiam*.—This was a suit by the appellants to recover certain described lands, &c.

There were three paragraphs in the complaint, to-wit—

1. In the usual form prescribed by statute for the recovery of lands.

2. Based upon a title-bond given by *John Smock* to his daughter *Leah Small*, and alleging that since its execution *Smock* had died, and that neither he nor his heirs had executed a deed in pursuance of said bond; that *Leah Small* was also dead, and plaintiffs were her heirs and children, &c.

3. Setting forth the facts averred in the second paragraph, and alleging further that, in consequence of the ignorance of the said *Smock* and the person who prepared said bond, a mistake occurred therein in using and inserting the word *heirs* therein, instead of the word *children*,

they supposing and using the term *heirs* as synonymous with the word *children*, and meaning and intending the latter; that said *Leah* was put in possession as tenant for life, &c.

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V.  
HOWLAND.

The said bond is as follows:

"Know all men by these presents, that I, *John Smock*, of," &c., "am held and firmly bound unto *Leah Small*, her lifetime, and to no other person, and after her death to her heirs forever, in the penal sum of," &c., "which payment well and truly to be made, I bind myself, my heirs," &c., "firmly by these presents, sealed," &c., "and dated this 6th day of *January*, 1827. The condition of the above obligation is such that if the above-bound *John Smock*, his executors," &c., "or either of them, shall well and truly make, or cause to be made, to the above-named *Leah Small*, her lifetime, and after her death to her heirs forever, a good and sufficient general warranty deed to the west half," &c., "on or before the first of *January*, 1828, then the above obligation to be void," &c.

It is also averred in the second paragraph of the complaint, that "the word heirs as used in said title-bond means, and was used and intended to mean, the children of said *Leah Small*, and that is its legal effect as used."

The defendant, *Powell Howland*, answered—

1. A general denial to the first and second paragraphs of the complaint, and that the bond mentioned in said second paragraph was not executed, &c., by said *Smock*.

2. That said *Smock* did not execute said bond, &c., (minutely setting forth the facts relied upon).

3. Setting up that after the death of *Smock*, *Leah Small* and her husband instituted such proceedings in chancery against the heirs of said *Smock*, on said bond, as resulted in obtaining a decree, and commissioner's deed based thereon, for said land, conveying the same in fee simple to said *Leah*, &c., the heirs of *Smock* consenting thereto as an advancement, &c.; that *Small* and wife entered upon said land, and took as their distributive share, &c., and whilst so in possession, to-wit, on the 19th day of *October*, 1839, they mortgaged the same to one *Adam Pence*, &c.;

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HOWLAND.

and that upon failure to pay, &c., said *Pence* procured a decree of foreclosure, &c., of said mortgage, at the *November* term, 1840, upon which such proceedings were had that said property was sold on the 30th day of *January*, 1841, for the sum of 100 dollars, to said *Pence*; and afterwards, on the 31st day of *December*, 1841, said *Pence* sold the same to said *Howland*, who, not relying upon the said sale, &c., as conveying to him any interest except that which came by descent to said *Leah*, and the wife of said *Pence*, as daughters of *John Smock*, &c., on the same day took a quitclaim deed from the other heirs of said *Smock*, &c.

The other defendants, being the heirs of *Smock*, &c., disclaimed any interest, &c.

To the last paragraph of the answer of *Howland*, a demurrer was filed, assigning for cause that the same did not state facts sufficient, &c., nor file the deeds relied on, and that the defendant was estopped from setting up the matters averred in said paragraph.

The demurrer was overruled. This presents the first question for consideration.

The second and third causes of demurrer are not noticed in the brief of appellant, and, under the rule, will be considered as waived.

Under the first cause, it is insisted that as the present plaintiffs were not parties to the chancery proceedings of *Small* and wife to obtain a title, they are not concluded thereby. But one of the plaintiffs was born at the time said proceedings were instituted in 1828; the others afterward and before 1854, at which time their mother, *Leah Small*, died.

Whether they were in any manner concluded by the proceedings in chancery in 1828, depends upon whether any title they might have derived to said property, in consequence of the facts stated, would have been so derived directly from their grandfather by virtue of said title-bond, or through their mother.

It is urged by the appellants that they do not derive title through their mother; that this is not a case in which the



rule in *Shelly's* case should apply; that it was manifestly the intention of the obligor in the bond, to bind himself to convey only a life estate to *Leah Small*, and the inheritance to her children; and that even if this is not so, the rule in *Shelly's* case cannot apply to executory contracts, of which this is one.

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v.  
MORRISON.

The appellee relies upon that rule, on this point, which is, as stated by *Blackstone*: "If an estate be made to *A.* for life, remainder to his right heirs in fee, his heirs shall take by descent; for it is an ancient rule of law, that whenever the ancestor takes an estate for life, the heir cannot, by the same conveyance, take an estate in fee by *purchase*, but only by *descent*." Book 2, p. 242. And he further says that "the word 'heirs,' in this case, is not esteemed a word of *purchase*, but a word of *limitation*, inuring so as to increase the estate of the ancestor from a tenancy for life to a fee simple." *Ibid.*

Upon issues formed and trial had, there was a verdict and judgment for the defendant.

In view of the conclusion which we have arrived at, it is not necessary to notice some points presented by counsel.

We are of opinion that the proceedings in chancery in 1828, vested the fee simple in *Leah Small*; consequently the plaintiffs in this case had not, at the time of the commencement of the suit, any title.

The judgment is affirmed with costs.

*E. Dumont, O. B. Torbet, J. L. Ketcham, and I. Coffin,*  
for the appellants.

*L. Barbour and A. G. Porter,* for the appellees.

LONG v. MORRISON.

At common law, a suit against a physician for malpractice, sounding in tort, did not survive to the representative of the person injured. The right of action died with the person.

14	595
184	420
14	595
140	166
142	641
14	595
144	480
145	290
14	595
163	634
14	595
170	375

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LONG  
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A husband had two actions against a physician for malpractice in treating his wife; the first for the loss of service, &c., the second, by husband and wife for the personal injury.

Where such malpractice results in death, an action lies for damages for the loss of service from its commission to its result; and if the right of action grow out of a breach of the contract for skillful treatment on the part of the physician, it is a chose in action, and survives the death of the wife.

As at common law, so by the code, husband and wife must join in a suit for an injury to the person of the wife, by malpractice of a physician, and the husband could, at common law, release the action; but as the wife, if living, could not maintain a separate action for the tort, so her administrator must join her husband in such suit; and under the statute the husband cannot settle the suit nor control its proceeds, independent of the administrator. But the non-joinder of the husband is not ground for a reversal, where no objection was made below.

The character of a witness cannot be impeached by proof of a single act of immorality.

✓ A physician is liable for damages arising as well from the want of skill as from neglect in the application of skill.

On the question of damages in such cases, the common-law rule must prevail.

Where the action is by husband, master, or parent, for individual loss occasioned by a tortious act towards wife, infant, or servant, the suffering of the immediate subject of the wrongful act cannot be taken into account in assessing the damages.

Thursday,  
August 23.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—*James Long* was called as a physician to attend upon Mrs. *Margaret Edmonds*, wife of *Joseph W. Edmonds*. By malpractice, as is alleged, he caused her death. Her husband, *Joseph W. Edmonds*, is still living. This fact is shown by the record to have entered, as an element, into the case. *Lewis B. Morrison*, as administrator of said *Margaret*, sued *Long* to recover damages for causing her death, and obtained judgment of 2,000 dollars.

The first question arising is, will the action lie?

It will not lie, if founded on the tort, upon the common law. The right of such action on the case, by that law, died with the person. Perk. Pr., 121.—Ind. Dig., 100.—1 Hilliard on Torts, 93.—*Carey v. The Berkshire Railroad Co.*, 1 Cush. 478. And see *Lynch v. Davis*, 12 How. Pr. R. 323, cited in Abb. Pl., 375; and Reeve's Dom. Rel., 377. See this latter authority for a suggestion.

At common law, two actions lie for personal injuries to

married women, infants, and servants. One by the husband, father, or master, for the loss of service, &c.; the other by the husband and wife, the infant, or servant, for the personal injury. *Bartley v. Ritchmeyer*, 4 Comst. 38.—*Robalina v. Armstrong*, 15 Barb. 249.—1 Starkie on Slander, 349.—Ind. Dig., 28.—*Hart v. Crow*, 7 Blackf. 351.

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LONG  
V.  
MORRISON.

In the case at bar, then, the husband had a right of action for the loss of service, &c., sustained by him between the times of the commission of the injury, and the death of the wife resulting therefrom. And if that right of action grew out of the breach of the contract for skillful service on the part of the physician, it survived the death of the wife. It was a chose in action. 2 Kent, 351.

And if the entire right of action in the case, grew out of breach of contract (the tort consisting in negligent execution thereof), then, it would seem, the action by the husband, with whom was the contract, for the damages resulting from its breach, must exhaust the right to sue for that breach. But if, at common law, an action would lie for the wrong done to the wife, in addition to the separate suit by the husband for loss of service, &c., where the wife survived; and, further, if such right of action would be a chose in action, still our statute has not vested it in the wife any farther than the common law did, because that statute only vests in her "the personal property held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift." Acts of 1853, p. 57, § 5.

And at common law, as also still by our code, husband and wife must join in suits for injuries, by third persons, to the person of the wife. Perk. Pr., pp. 136, 137. And the husband can settle and release such actions, at least when brought for injuries to the wife by malpractice. *Ballard v. Russell*, 33 Maine R. 196, cited in 2 Hill on Torts, p. 591.

In *Merrill v. Smith*, 37 Maine R. 394, it was held that, under the married women's act, the husband had a right to the earnings of the wife, and to property purchased with such earnings as at common law.

In no aspect of the case at bar, then, could Mrs. *Ed-*

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MORRISON.

*monds*, if surviving, maintain a separate action against *Long* for the injury, to obtain compensation for which this suit is prosecuted. Can her administrator maintain such a suit? If so, it is because the action is authorized by the code. Is it thus authorized? It is enacted—

“SEC. 27. A father, or in case of his death or desertion of his family, or imprisonment, the mother, may maintain an action for the injury or death of a child; and a guardian, for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of the ward.” 2 R. S. p. 33.

“SEC. 784. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.” 2 R. S. p. 205.

Personal property, it may be remarked, of the deceased, in certain contingencies, might go to the husband. And see 13 Ind. R., on p. 426.

The first point to be settled here is, was the death of Mrs. *Edmonds* caused by such a wrongful act as would have furnished a ground of action on account of personal injury to her, had she survived? We hold the affirmative. The act might have been sued for in tort by her, with her husband, had she survived, as it is now by her representative. 1 Chit. Pl. 134, 135.

This being the case, we inquire, in whom would have been the right of action? It would have been in the husband and wife jointly so long as they both lived, but would have existed in the wife alone on the death of the husband, the wife surviving. 1 Swann's Pr., 88, 89.—Reeve's Dom. Rel., 63.

Now, the above statute continues the right of action in the personal representative of a deceased, where the deceased might have sued if living; and two views here present themselves to the mind of the Court, as to the manner of this survivorship.

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LONG  
v.  
MORRISON.

1. Where the disability of coverture does not exist, the right of action exists in the injured party, and survives to the representative of such party; and, as death terminates the coverture, the right of action survives to the representative alone of the deceased in cases like the present. Some of the members of the Court hold this position.

2. The right of action may be regarded as continued by the statute in the personal representative just as it existed in the deceased. Hence, in this case, it caused the right of action to survive to the representative of the wife, as one to be prosecuted jointly with the surviving husband; though under the statute, he would not have a right to settle the suit, nor control the proceeds of it, independent of the administrator; as the statute declares the use to be made of the proceeds of the judgment recovered.

Under this view, the conclusion would be, that the action is maintainable; but that it should have been brought in the joint names of the husband and administrator. Nevertheless, under the code, the non-joinder of the husband, in this case, will not be ground of reversal, because it was not specially raised as an objection below.

On the trial, the defendant proposed to impeach the character of the plaintiff's principal witness by proof of a single act of immorality. Permission to do so was rightly refused. Proof should have been offered of his general character for morality. See *Shattuck v. Myers*, 13, Ind. R. 46. In that case particular acts of immorality, on the part of a witness, were permitted; not for the purpose, however, of impeaching her moral character as a witness. The action was for seduction. The father, who brought the action, introduced the daughter as a witness; and it was held, that while, in her character as witness, she could only be impeached in the usual mode, through general questions, yet, in her character as the immediately injured party, and

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the source of damages in the suit, immoral acts, showing that source to be impure, might be proved in mitigation of damages.

The Court, on the trial of the case at bar, correctly instructed the jury on the question of liability of the physician for unskillfulness. He was liable for damages arising as well from the want, as from the want of application, of skill. "It is the party's own fault if he undertakes without having sufficient skill, or if he applies less than the occasion requires." Story on Bailments, § 431. See *Conner v. Winton*, 8 Ind. R. 315; 3 Shars. Blacks. p. 122, and note, and p. 169.

On the subject of damages, the Court told the jury that the action was predicated "upon the injury to the deceased; and the amount of damages should be compensatory for the injury, short of the loss of life, which the law cannot estimate; that the jury might consider the pain and suffering of the deceased, but not the suffering of her parents, nor the suffering nor loss of the husband; that vindictive damages could not be given, nor an amount exceeding that laid in the complaint."

On the question of damages in this class of cases, the common-law rule must prevail. Our statute differs materially from that of *New York*, under which *Oldfield v. The New York, &c., Co.*, 4 Kern. 310, was decided.

Where the action is by the husband, or master, or parent, for their individual losses respectively, occasioned by tortious acts towards the wife, infant child, or servant, the individual suffering of the immediate subject of the wrongful act, cannot be taken into account in the assignment of damages. See *The Ohio, &c., Co. v. Tindall*, 13 Ind. R. 366.

*Per Curiam*.—The judgment is affirmed with 1 per cent. damages and costs.

*J. S. Newman, O. Newman, J. P. Siddall, N. H. Johnson, G. W. Julian, and L. Develin*, for the appellant.

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1860.

## HUBBARD and Wife v. CHAPPEL.\*

HUBBARD  
v.  
CHAPPEL.

Suit to foreclose a mortgage. Answer, that the land was conveyed for a consideration by the mortgagee to the mortgagor, and mortgaged to secure the payment of the consideration; and averring that the mortgagee had no title. *It seems*, that the answer was bad, so far as a judgment of foreclosure was concerned.

A general denial admits the character in which the plaintiff sues; and so does a default where that character is averred in the complaint.

*Nul tiel corporation* puts in issue the existence of the corporation, at least so far as to require proof of *user*; but where the suit is upon a contract other than of subscription for stock, in which the existence of the corporation is recognized, the party being estopped to deny the existence of the corporation, cannot require proof of it, because his admission is conclusive.

If the name in which a contract is made imply a corporation *prima facie*, while, in fact, the company assume to be only a partnership, the fact may be shown.

In a suit by a corporation, it is no defense to allege a consolidation with a corporation of another state, unless the terms of consolidation or the dates or provisions of the statutes authorizing it are given.

APPEAL from the *Wabash* Circuit Court.

PERKINS, J.—Suit to foreclose a mortgage given by *Hubbard* and wife to the *Lake Erie, Wabash, and St. Louis Railroad Company*; and by said company assigned to one *Boody*, and by him assigned to the plaintiff.

Answer in seven paragraphs—

1. The general denial.

2. That the land was conveyed for a consideration, by the railroad company, to *Elias Hubbard*, and by him, his wife joining, mortgaged to the railroad company to secure the payment of the consideration, and averring that the railroad company had no title.

It may be here observed that a demurrer was overruled to this paragraph; that issue was then taken upon it, which was tried and found for the plaintiff.

Perhaps the paragraph was bad so far as judgment for the foreclosure of the mortgage was concerned. *Hubbard*

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\* This was decided on *Monday, May 28*, but held back on petition for a rehearing. The petition was overruled. The case was twice argued by learned counsel.

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1860.

HUBBARD  
v.  
CHAPPEL.

conveyed to the railroad company the title he received, and it is difficult to perceive, if neither had title, how a simple judgment of foreclosure could injure him. It might be important for him to resist a personal judgment for the amount left unpaid by the sale of the land.

It has been said that a mortgagor, under the circumstances set out in the paragraph in question, is estopped to deny the title of the mortgagee.

A part of the five remaining paragraphs deny that the grantee in the mortgage was a corporation at the time of the execution of the mortgage. Those paragraphs are bad, because the mortgagor is estopped to set up such fact. This has been often ruled, as a general proposition, in this state; too often to be now denied as law, unless shown to be clearly erroneous. It may, perhaps, not be applicable to suits on subscriptions of stock in corporations formed under the general law; but as to this we here decide nothing.

These three propositions have been judicially settled in *Indiana*—

1. A default admits the character in which the plaintiff sues (13 Ind. R. 143); at all events, where that character is averred in the complaint. A default admits the material allegations in the complaint.

2. The general denial admits that character, though the rule is otherwise in *New York*. *The Guaga Iron Company v. Dawson*, 4 Blackf. 202.—*Harris v. The Muskingum, &c., Co.*, *id.* 267.—Ind. Dig., p. 469.

3. *Nul tiel corporation* puts in issue, so far, at least, as to require proof of user, the existence of the corporation; but where the suit is upon a contract, at all events, other than of subscription for stock, made with the corporation, in which the existence of the corporation is recognized, the party being estopped to deny the existence of the corporation, cannot put the plaintiff upon the proof of it; because his own admission, thus made, is conclusive. See 4 Kent (6th ed.), side p. 261, note c.

Conditions precedent must be performed in cases of suits for stock. 8 Ind. R. 397.



Now, wherein is this a departure from the general rule of law? It seems to be uniformly conceded that if a party contract with a corporation after it has forfeited its corporate existence, he is estopped to set up the forfeiture. And it is said the corporation, when sued, is estopped to deny its corporate capacity assumed in a contract. But how can it pay debts, if it cannot collect dues? So, it is almost uniformly said, that irregularities in organization cannot be set up in bar of a suit by the corporation. See *Eaton v. Aspinwall*, 19 N. Y. R. 119; *The Methodist, &c. v. Pickett*, *id.* 482.

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Why, then, is not the general proposition a sound and reasonable one, that where persons are assuming to act as a corporate body, under a law authorizing such corporation; where, in short, user is existing, under a pretended organization, and a party contracts with such body as a corporation, he should be estopped to deny their corporate existence? What, in fact, is here involved but, in a wide sense, irregularity of organization? And why is it not the duty of the contracting party to inquire in the one case as well as the other? And may not the corporation have been led to act upon its means, in one case as well as the other?

If the name in which the contract may have been made simply, *prima facie*, imply a corporation, while, in fact, the company is not assuming to be a corporation, but only a partnership, this fact may be shown. See *Jones v. The Cincinnati Type Foundry Company*, *infra*. Such is the law in some of the other states. See *Case v. Benedict*, 9 Cush. 540; *Worcester, &c. v. Harding*, 11 *id.* 285; *Jones v. The Bank of Tennessee*, 8 B. Mon. 122; *Jones v. The Cincinnati Type Foundry Company*, at this term (1).

The remaining paragraphs admit that the mortgagee was a corporation at the date of the mortgage, but aver that under the laws of *Ohio* and *Indiana* she had consolidated with an *Ohio* company, under a new name. The terms of the consolidation are not given; neither the dates nor provisions of the alleged statutes of this state or *Ohio* are stated; no facts, indeed, are set forth, upon which any

May Term, 1860. legal question can be raised. These paragraphs are bad for uncertainty. See *Wright v. Bundy*, 11 Ind. R. 398.

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RODMAN.

*Per Curiam.*—The judgment is affirmed with 5 per cent. damages and costs.

*C. B. Smith, W. J. Smith, and J. M. Washburn*, for the appellants.

*J. D. Conner and W. Z. Stuart*, for the appellee.

(1) *Ante*, 89.

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STURGIS and Another v. RODMAN.\*

APPEAL from the *Marion* Circuit Court.

*Per Curiam.*—Suit by *Rodman* against *Sturgis* and *Ellis*, to recover money deposited with them by the plaintiff. The defendants were non-residents of the state, and proceedings in attachment were had. *Ozias Bowen* was summoned as garnishee. Several creditors of *Sturgis* and *Ellis* filed their claims under the attachment, and final judgment was rendered against *Sturgis* and *Ellis*, and *Bowen* as garnishee, by default.

Several errors are assigned, but we shall not notice them, as no steps were taken in the Court below to correct them. It has been settled by several decisions that in judgments taken by default, the defendant must make his application to the Court below to correct the error, if any exist, before bringing the case here.

The appeal is dismissed with costs.

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\* This case was decided on the 8th of *June*. A petition for a rehearing was filed on the 7th of *August*, and overruled on the 23d of *November*.

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## PARISH and Another v. HEIKES.\*

PARISH  
v.  
HEIKES.

A paragraph of an answer setting up the pendency of another cause which ought to be joined, must state facts showing that the causes are such as may be joined. The general allegation that the causes ought to be joined, or that the notes sued on were made by the same parties on the same day, is not sufficient.

Upon affidavit by the plaintiff's attorney that the plaintiff is a non-resident, &c., an order against him to answer interrogatories may be stricken out; and the overruling of a motion by defendant for a continuance till the next day to enable him to file an affidavit of the materiality of such answers, is not an abuse of discretion, where it appears by an undertaking for costs that the plaintiff was a non-resident.

APPEAL from the *Tippecanoe* Court of Common Pleas.

HANNA, J.—Suit by an assignee against the maker of promissory notes.

Answer, first, denial; second, payment; third, usury; fourth, that another suit between same parties was pending in same Court for another note given at same time, and that said causes of action ought to be joined, or the plaintiff pay the costs of one of the suits, &c; fifth, denial of assignment.

Interrogatories were also filed, which the plaintiff was required to answer by an order to that effect.

There was a demurrer sustained to the fourth paragraph of the answer, because it did not state facts sufficient.

Reply in denial as to the second and third.

Upon the affidavit of the attorney of the plaintiff, of the non-residence and absence from Court of plaintiff, the order to answer interrogatories was, upon the calling of the cause for trial, stricken out, and a motion to continue until the next day to enable the defendant to file an affidavit of the materiality, &c., of an answer thereto, was overruled.

Upon the trial, the notes and assignments were admitted in evidence without proof of their execution, or any written notice (2 R. S. p. 97) that they would be offered in evidence.

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\* This case was decided on the 12th of June. A petition for a rehearing was filed on the 23d of July, and overruled on the 3d of December.

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These various rulings were each questioned, and are now objected to here as erroneous.

The demurrer was properly sustained; the paragraph did not state facts showing that the causes of action were such as might be joined. 2 R. S. p. 43. The general allegation that they ought to be joined was not sufficient; nor that the notes were executed on the same day and by the same parties.

A legitimate mode of informing the Court of the absence of the plaintiff, was by affidavit, which presented a sufficient reason for the order of the Court in reference to the answer to interrogatories.

The motion to delay the case was then addressed to the sound discretion of the Court. We do not perceive any abuse of that discretion, especially when we take into consideration the fact that an undertaking for costs was filed with the complaint, which implied the non-residence of the plaintiff.

The statute, 2 R. S. p. 97, has reference to writings offered in evidence, other than those pleaded as the foundation of the action, or defense. *The State v. Hart*, 12 Ind. R. 424.

*Per Curiam.*—The judgment is affirmed with 1 per cent. damages and costs.

*D. Mace* and *J. L. Miller*, for the appellants.

*S. A. Huff* and *R. Jones*, for the appellee.

## APPENDIX.

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### VAIL v. HEUSTIS.\*

A party may purchase a bill of exchange at any rate of discount; but if it be shown that the transaction was not, in its inception, real, but a mere device to evade the statute against usury, the money advanced will be regarded as a loan.

Where the bill was drawn by a partner upon the firm, to his own order, and accepted by him in their name and indorsed to another, the question whether the payee could maintain a suit upon it at maturity, is immaterial in determining the character of the transaction.

APPEAL from the *Dearborn* Court of Common Pleas.

DAVISON, J.—*Heustis*, the plaintiff below, brought this action against *Vail*, who was the defendant, upon the indorsement of a bill of exchange for the payment of 750 dollars. The bill bears date *Cincinnati, June 29, 1857*; was drawn by the defendant, payable to himself, at the branch of the bank of the state of *Indiana*, at *Lawrenceburgh*; was accepted by *Bates, Neil, and Vail*; and indorsed by the payee to the plaintiff. The complaint shows that the acceptors did not pay the bill when it became due, upon presentation at the place where it was made payable, of which the defendant had due notice, and that the bill remains due and unpaid, &c.

The defendant answered—

1. By a general denial.
2. That the bill was drawn, accepted, and indorsed at

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\* This case was decided at the *November* term, 1859, but was mislaid, and not found in time for publication in its proper place.

A petition for a rehearing was filed *January 21, 1860*, and overruled *May 8*.

The case is followed in a case between the same parties, *ante*, 85, where, not being able to find the names, the Reporter, by mistake, says "there is no such case."

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*Lawrenceburgh*, in the presence of the plaintiff, and not in *Cincinnati*, that the plaintiff, who discounted it, did, usuriously, corruptly, and contrary to law, reserve, contract for, and receive interest upon the principal of the bill, at a greater amount than six per cent. per annum; viz., at the rate of two per cent. per month in advance, and that the amount so paid to the plaintiff for interest reserved, amounted to the sum of 60 dollars; that the bill was dated *Cincinnati, Ohio*, for the purpose of evading the laws against usury, and was drawn, accepted, and indorsed by the defendant, upon and for the loan of a sum of money, viz., 750 dollars, which was then and there loaned by the defendant to the plaintiff, &c.

Reply in denial of the second paragraph.

The Court tried the cause, and found for the plaintiff 756 dollars, 72 cents; and having refused a new trial, rendered judgment, &c.

Upon the trial, the plaintiff gave in evidence the bill of exchange; proved that it was duly presented for payment; that it had been regularly protested for non-payment; and that notice of protest had been duly given; and rested.

And thereupon the defendant, to sustain his second defense, introduced the plaintiff, who testified substantially as follows: *Vail*, the defendant, was a member of the firm of *Bates, Neil, and Vail*, who were partners in a railroad contract. He was their financial partner; attended to selling their real estate, and raising money with which to carry on their contract; had frequently requested plaintiff to purchase bills on said firm, offering to sell them at a certain amount off their face, which was always equal to two per cent. per month. On the day the bill in question was drawn, *Vail* met plaintiff on the street; said he wanted to raise money—to sell plaintiff a bill on *Bates, Neil, and Vail*; and they went to *Vail's* house in *Lawrenceburgh*, where, in his own handwriting, he drew, accepted, and indorsed the bill, and proposed to allow plaintiff two per cent. per month, which was deducted from the face of the bill. He first proposed to date the bill at *Lawrenceburgh*, and make it payable in *Cincinnati, Ohio*; but plaintiff ob-

jected, for the reason that he did not understand doing business in the banks in *Cincinnati*. The bill was then drawn, accepted, and indorsed, as it stands. Plaintiff, in his testimony, says that the transaction was the purchase of the bill, and not the loan of money.

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The statute is that "interest upon the loan or forbearance of money," &c., "shall be at the rate of six dollars a year upon one hundred dollars; and no greater rate of interest shall be taken directly or indirectly," &c. 1 R. S. p. 343, § 1.

Thus, it will be seen that the amount, in this instance, deducted from the bill, was more than the statutory rate of interest. Hence, the inquiry arises, was the sum actually received by the defendant a loan of money?

The instrument in suit is in the form of an ordinary bill of exchange, and the plaintiff had a right to purchase it at any rate of discount agreed on by the parties, unless the evidence shows that it was not, in its inception, a real transaction, but a mere device to evade the statute. If it was, then the money advanced on the bill was, in contemplation of law, a loan to the defendant.

But it is argued that the payee could not have maintained an action on the bill at its maturity; and that, therefore, it was not a real transaction. This reasoning does not seem to be correct. The proof is, that the defendant was the financial partner of the firm of *Bates, Neil, and Vail*, and as such was authorized to raise money to carry on the railroad contract; and, in the absence of contrary proof, it may be inferred that, for such purpose, he had a right to draw a bill upon the firm, to his own order, and accept it in their name. The question whether the payee could or could not have sued on the bill, is not material, because when indorsed it became operative in the hands of the indorsee. Edw. on Bills, pp. 186, 187.

But whether the transaction, in this case, was or was not "a loan of money," was a pure question of fact properly submitted for trial under the pleadings. And the Court, sitting as a jury, having in effect decided that it was not a

May Term, 1860. loan, we are inclined, in view of the evidence, to sustain its decision.

VAIL  
v.  
HEUSTIS. *Per Curiam.*—The judgment is affirmed with 3 per cent. damages and costs.

*J. Schwartz and P. L. Spooner, for the appellant.*

*D. S. Major, for the appellee.*



**AN INDEX**  
**TO THE PRINCIPAL MATTERS**  
**CONTAINED IN THIS VOLUME.**

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**ACTION.**

1. Assumpsit lay to recover the stipulated price due on a special contract not under seal, where the contract had been completely executed, so that only a duty to pay the money remained, and it was not necessary, in such case, to declare upon a special agreement. This rule is applicable to pleadings under the code.—*Brown v. Perry*, 32.
2. The abolition of the distinction between actions at law and suits in equity, does not entitle a party to recover in a case where, before such abolition, he could not have recovered either at law or in equity.—*Woodford v. Leavenworth*, 311.

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See EXECUTORS AND ADMINISTRATORS.

## ADMISSIONS.

The admissions of a party must be received with caution by the jury, particularly when the witness can only give part of them.—*Chandler v. Schoonover*, 324.

## ADULTERY.

An affidavit charging a person with living in open and notorious adultery or fornication, must allege a *living together*. Occasional illicit intercourse between the defendant and the woman named, is not sufficient ground for the charge.—*The State v. Gartrell*, 280.

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## ADVERSE POSSESSION.

1. A rightful title is not necessary to constitute an adverse possession such as will sustain the plea of the statute of limitations. Possession under claim or color of title is sufficient. The fact of possession and the *quo animo* it commenced, are the only tests.—*Doe ex dem. Dunn v. Hearick*, 242.
2. Possession taken and continued in good faith, under an assertion of right and a claim of title believed to be good, may be adverse, though the claim of title be under a sale for taxes prior to which the land sold was not advertised.—*Ibid*.
3. When a purchaser of land from the *United States*, has made the final payment and is entitled to a patent, he is the equitable owner of the premises; and if an adverse possession be set up, the statute of limitations will run against such purchaser; for after becoming entitled to a patent, he might at any time obtain possession of the premises by a suit in equity.—*Ibid*.

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## AGENCY.

An agent is a competent witness to prove his authority where it is given by parol.—*Wolf et al. v. Smith*, 360.

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## AMENDMENT.

Where the proof varies from the averment, the pleading, being amendable below, will be considered as amended in the Supreme Court.—*Cleveland v. Roberts*, 511.

See ERROR; EXECUTORS AND ADMINISTRATORS, 6.

## ANSWER.

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## ANTENUPTIAL CONTRACTS.

See HUSBAND AND WIFE, 8.

## APPEAL.

1. If a person apply for license to sell liquor under the present statute, and show himself to be within the class entitled thereto, and offer compliance with the law, and the county board refuse the license, he may appeal to the Circuit Court under the general statute.—*Ex parte Dunn*, 122.
2. But a remonstrant against the issuing of license to retail, cannot appeal from the decision of the county board as to the fitness of the applicant. The general act (1 R. S. p. 229) does not apply.—*Drapert v. The State*, 123.
3. Affidavit by *A.* alleging that on, &c., when he was about starting to remove from the state, a summons was served on him at the suit of *B.*; that he was informed at the time that only about 10 dollars was claimed (he does not state who informed him); that he owed *B.* a note of 10 dollars, and supposed it was that for which suit was brought; but having made arrangements to pay that, and knowing that he did not owe him any other sum, and it being some distance to the office of the justice, he continued on his journey, and remained out of the state for more than thirty days after judgment, which was for 99 dollars, 75 cents, and was not, during that time, aware of said judgment; that said judgment was wholly unjust; and therefore, &c.; whereupon *A.* moved that an appeal be authorized by the Common Pleas Court, &c., under the statute. *Held*, that no sufficient error is shown to authorize an appeal after thirty days.—*Tucker v. Makepeace*, 186.
4. Upon the dismissal of an appeal, the parties are out of Court; and the refileing of the record is the institution of a new suit, at least so far as to require that notice shall be given to the defendant.—*The Board of Comm'rs, &c. v. Brown*, 191.
5. A rehearing cannot be had upon an affidavit filed more than sixty days after the judgment.—*Ibid.*
6. Where the appellant submitted a cause in the Supreme Court without the appellee being in Court, and the cause proceeded to judgment before the error was discovered, the Court granted a rule upon the appellant, and ordered notice thereof, to show cause why the judgment should not be revoked, and the submission set aside.—*Ibid.*
7. The Court of Common Pleas has no authority to order a justice of the peace to grant an appeal from his judgment, after the expiration of the thirty days allowed by statute.—*The State v. Kunbert*, 374.
8. The statute in reference to filing a transcript of a justice of the peace, is merely directory as to the hand of the person by whom he shall lodge the transcript with the clerk.—*Burgess v. Matlock et al.*, 475.
9. If an appellee join in error, and then add a paragraph alleging that the appeal was not taken within three years, &c., he waives his joinder.—*Smith et al. v. Conlan*, 513.
10. And it seems, that if the appellant submit the case, without a reply to such answer, he admits its truth.—*Ibid.*

*By Garnishee, from a Justice.]*  
*Upon Perfected Record.]*

See ATTACHMENT, 3.  
 See PRACTICE, 11.

## APPEARANCE.

1. To constitute an appearance, there must be some formal entry, or plea, or motion, and this must be of record, and can be tried only by the record.—*Scott et al. v. Hull et al.*, 136.
2. The appearance of defendants, a part of whom have not been served with process, at the taking of depositions to be used in the cause, was *held* not to be such an appearance as would defeat an application to remove the cause to the Circuit Court of the *United States*, under the act of congress of 1789.—*Ibid.*

See COSTS, 3; COURT OF CONCILIATION, 3; MARITIME LIENS, 4, 5.

## ARBITRATION AND AWARD.

1. If either party to a submission to arbitration fail to perform the award, the other party has two remedies. He may have the award made a judgment of the Court designated in the agreement to submit, or he may have an action upon the arbitration bond.—*Coats et al. v. Kiger*, 179.
2. But neither of the remedies can accrue against a party who has not been served with a copy of the award.—*Ibid.*
3. Where parties agree to a common-law arbitration, without fixing the time and place of rendering the award, notice of the award must be given to both parties. This having been done, a suit may be brought upon the award in any Court having jurisdiction.—*Francis v. Ames*, 251.
4. Where parties agree to an arbitration under the statute, they must follow the statute, unless, in given particulars, they waive its requirements. The statute requires that a copy of the award shall be delivered to each party within a certain time. And where the agreement is that the award be made a rule of Court (naming the Court), as provided by the statute, it must be filed and enforced pursuant to the agreement.—*Ibid.*
5. Or a suit may be brought upon the bond of submission. This is a branch of the statutory remedy.—*Ibid.*
6. A suit pending may be referred to arbitration under a rule of Court; but as the statute makes no provision for this class of arbitrations, the proceedings must be regulated by the rule of reference, the agreement of the parties, or the common-law practice.—*Ibid.*
7. The three modes are cumulative remedies, and any of them may be adopted; but when adopted, it must be pursued unless a deviation be agreed to by both parties.—*Ibid.*
8. The award in this case (see the opinion) was not void for uncertainty.—*Carson v. Earlywine*, 256.
9. There was no submission of, nor award upon, the title to real estate. See the submission and award in the opinion.—*Ibid.*
10. At common law, where the matter submitted to arbitration involved a mere question of damages, the submission might be by parol, by a simple writing, or by deed.—*Ibid.*
11. In a common-law arbitration, the award may be valid though not attested by a witness, and though copies of it are not furnished to the parties by the arbitrators. *Aliter*, in case of a statutory award.—*Ibid.*
12. All objections that could be successfully urged, either at law or in chancery, against an award, may now be made in a suit upon it.—*Ibid.*
13. Mistake of law was not one of those objections.—*Ibid.*

*If relied upon must be pleaded.]*

See EVIDENCE, 2.

See JUDGMENT, 1.

## ASSAULT AND BATTERY.

1. Suit for assault and battery. Demurrer to a paragraph of the complaint, assigning for cause that it contained two causes of action, overruled. *Held*, that this was right: the objection should have been taken by motion to strike out.—*Schlosser v. Fox*, 365.
2. The defendant answered by general denial, and specially, *son assault demesne*. A demurrer was sustained to the second paragraph. *Held*, that this was right, because it did not show that the first assault alleged justified or excused the second, for which suit was brought.—*Ibid*.
3. The defendant filed a third paragraph of his answer, setting forth that he had not been cited before the Court of conciliation. *Held*, that this was no bar to the suit. It might have been, for a motion upon taxation of costs.—*Ibid*.
4. On the trial, the defendant offered to prove, in mitigation of damages, that the plaintiff had caused a prosecution for malicious mischief to be instituted (among others) against the minor son of the defendant, and that he assaulted and beat him for so doing. He also offered to give the record of such prosecution in evidence. He also offered to prove that the plaintiff had, some two or three days before the commission of the assault and battery, given defendant great provocations, without specifying particularly what they were. *Held*, that if matter in mitigation can be given in evidence under the general denial, the above items of evidence were rightly excluded—the first as being no matter of mitigation; the second as being irrelevant; and the third as being too indefinite in the offer, and probably of too long prior occurrence.—*Ibid*.

## ASSAULT AND BATTERY WITH INTENT TO MURDER.

See INDICTMENT, 1.

## ASSESSMENT OF DAMAGES.

See CITIES, 2; DAMAGES.

## ASSIGNMENT.

- A. deposited with B., a justice of the peace, certain claims for collection, and took a receipt therefor, *June* 22, 1855. Afterwards B. collected 65 dollars on the claims. A. transferred the receipt, by indorsement in writing, to C., *February* 14, 1856, of which the justice had notice in that or the ensuing month. C. demanded the 65 dollars, *April* 2, 1856. Payment refused. In the spring of 1855, A. held, as assignee, a note for 80 dollars which, for a full consideration, he assigned to D. who assigned it to E. In the summer of 1855, A. arranged by parol that D. should receive from the justice, as much of the proceeds of the claims as would pay him for the consideration of the assignment of the note by A., and in *March*, 1856, the justice paid him the 65 dollars collected, and D. paid it to E. The assignee of the receipt, C., sued the justice for the refusal to pay the 65 dollars to him. *Held*, that the indorsement on the receipt amounted to no more than an equitable assignment of the claims, or the judgments when recovered, and the instrument not being assignable by statute, the assignee took no greater interest than would have passed by mere delivery, without indorsement; that, hence, the transaction was, in effect, but a parol, equitable assignment, to which even the delivery of the receipt was not essential; that the arrangement previously made with D. by which he received the money collected, was also a parol equitable assignment, to the amount designated, differing from the one subsequently made to C.

only in the non-essential point of the delivery of the receipt; that the assignment to *D.* being prior in point of time, he was entitled to be first paid, notwithstanding the fact that the subsequent assignee first notified the justice of his assignment.—*White v. Wiley*, 496.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONTRACT, 3, 5, 6; CORPORATIONS, 11, 12; LEASE; PROMISSORY NOTES, 1, 6, 8.

#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A reservation of the surplus to an assignor, where it is made to depend upon certain conditions to be complied with by the creditors, and particularly upon the condition of releasing the debtor, will avoid the deed of assignment; but the creditor may be excluded from the benefit of the fund, unless he abide the assignment and await the closing of it for any balance that may be due him after the fund is exhausted, and the fund may be applied upon claims of other creditors, without rendering the deed fraudulent *per se*.—*McFarland et al. v. Birdsell et al.*, 126.
2. In the absence of the requirement of a release from the creditor, the mere hypothetical reservation of the surplus to the debtor will not vitiate the assignment.—*Ibid.*
3. Where the deed is legal on its face, evidence tending to show that the assignment was an honest transaction is admissible.—*Ibid.*

See TAXES, 12.

#### ASSUMPSIT.

See ACTION, 1.

#### ATTACHMENT.

1. Attachment against a foreign corporation. Debtors of the corporation, residing in this state, being garnished, they appeared and answered, admitting the indebtedness, without in all cases specifying the nature of the evidence of the indebtedness, and in no case claiming exemption from judgment on the ground that such evidence was paper governed by the law merchant. Judgments were rendered against them. Subsequently, the corporation made an assignment, and the assignees appeared in the attachment suit, and answered, setting up the assignment, and claiming that the evidences of indebtedness against the garnishees had passed to them, so as to make the garnishees debtors to the assignees; but they did not show that those evidences were negotiable paper. *Held*, that their answer was bad, and that the judgments were right.—*Stetson et al. v. Cleveay et al.*, 453.
2. A sheriff or his deputy taking property in attachment, may keep it himself, and receive the amount allowed by the Court therefor, or he may employ some one to keep it, pay him therefor, and receive the amount, collected as part of the costs, unless he pay the keeper more than the Court will allow.—*Jones v. Thomas*, 474.
3. The defendant in a proceeding in garnishment, may appeal, under the general statute, from the judgment of a justice.—*Burgess v. Matlock et al.*, 475.
4. An affidavit for an attachment in the words as affiant "verily believes," is sufficient.—*McNamara v. Ellis*, 516.
5. Where the proceedings on an attachment do not show that the property was attached in the presence of, nor that it was appraised by, a householder, an order for its sale will be reversed.—*Ibid.*

See COSTS, 5; MARITIME LIENS, 1, 2, 5, 6; PLEADING, 10.

## ATTORNEYS.

*Prosecuting and District distinct.]* See OFFICE, &c., 10.

## AUDITOR OF STATE.

See BANKS AND BANKING, 2, 3, 5; CLAIMS AGAINST THE STATE.

## B.

## BANKS AND BANKING.

1. The issuing of a note by a bank organized under the general banking law of 1852, and the receiving of it by the holder as money, is, in effect, a contract between the holder and the bank that the latter will pay it on demand; and upon the refusal of the bank to do so, it may be sued by the holder.—*Conwell, President, &c., v. Hill*, 131.
2. Section 8 of that act confers no power upon the auditor—the trust funds having been exhausted—to sue the bank for a balance due the note-holder.—*Ibid.*
3. The measures to be adopted by the auditor to prevent loss to note-holders, relate solely to the management of the stocks transferred to him by the bank.—*Ibid.*
4. The note-holder may sue the bank without in the first instance filing certificates of protest with the auditor—the stocks in the hands of the latter being merely collateral security.—*Ibid.*
5. There is nothing in the act requiring the auditor to delay the payment of such protested notes until all the notes issued by the bank have been deposited in his office.—*Ibid.*
6. In a suit against the bank, upon failure to pay on demand, the notes, or a copy of them, should be filed with the complaint; and the fact that they are deposited in the auditor's office, does not excuse a failure to file them or a copy.—*Ibid.*
7. It seems, that the filing of one note, or a copy of it, of each denomination, with an averment that there were other notes, enumerating them, of like denomination, would be sufficient.—*Ibid.*

## BASTARDY.

1. In a prosecution for bastardy, the credibility of the mother of the child is necessarily a question for the jury, in weighing her testimony.—*McCullough v. The State ex rel. Wilson*, 391.
2. In a prosecution for bastardy, the jury may consider, in determining the credibility of the relatrix, the youth of the defendant, and the testimony of the relatrix that he never had connection with her but once, previous to which she had had no intimacy with him whatever, and had not since intimated her condition to him, or asked reparation, except by instituting the prosecution.—*O'Brien v. The State ex rel. Swift*, 469.
3. Where the child was born eight and a half months after the alleged single act of intercourse, it was held that the defendant might prove that the mother had had sexual intercourse with other persons within two weeks preceding and two weeks succeeding the alleged date of her impregnation, and that such proof should be considered by the jury in connection with her credibility as a witness.—*Ibid.*
4. The mother of a bastard may settle and dismiss a bastardy suit brought on her relation.—*Baker v. Roberts*, 552.

## BENCH WARRANT.

See CRIMINAL LAW, 3.

## BILL OF EXCEPTIONS.

1. A bill of exceptions filed after term without leave, is no part of the record.—*Howard v. Burke*, 35.
2. If the improper admission of testimony be complained of, the bill of exceptions should distinctly present the points, and the statement by the Court of such facts as may have affected the decision.—*Mitchell et al. v. Dibble et al.*, 526.
3. If a bill of exceptions state that a party was absent at the time his pleading was filed, he will be held to have been absent although his pleading have his name to it as if he had filed it in person.—*Meredith et al. v. Lackey*, 529.
4. The certificate of a person acting as judge, made out of Court, and not made part of the record, to the effect that the parties, by consent, extended the time for filing bills of exceptions, will not be considered; nor is a bill of exceptions filed after the time—there being no order of the Court permitting the filing—a part of the record.—*Roloson et al. v. Herr*, 539.

See PRACTICE, 20, 26.

## BILL OF PARTICULARS.

See PLEADING, 38.

## BILLS OF EXCHANGE.

1. A party may purchase a bill of exchange at any rate of discount; but if it be shown that the transaction was not, in its inception, real, but a mere device to evade the statute against usury, the money advanced will be regarded as a loan.—*Vail v. Heustis*, 607.
2. Where the bill was drawn by a partner upon the firm, to his own order, and accepted by him in their name and indorsed to another, the question whether the payee could maintain a suit upon it at maturity, is immaterial in determining the character of the transaction.—*Ibid.*

See PLEADING, 38; PROMISSORY NOTES.

## BOND.

*Of Administrator, for Sale, &c., of Land.*] See EXECUTORS AND ADMINISTRATORS, 5.

## C.

## CASES EXPLAINED, &amp;c.

1. GIBSON v. THE STATE, 9 Ind. R. 64, followed.—*Keely v. The State*, 36.
2. GILES v. GULLION, 13 Ind. R. 487, followed.—*Giles et al. v. Law*, 16.
3. MAXWELL v. COLLINS, 8 Ind. R. 38, followed.—*Matlock v. Powell*, 378.
4. PORT v. WILLIAMS, 6 Ind. R. 219, followed.—S. P. 569.
5. RESOR v. RESOR, 9 Ind. R. 347, distinguished from *Miller et al. v. Blackburn*, 62.
6. SNYDER v. THE PRESIDENT, &c., OF ROCKPORT, 6 Ind. R. 237, affirmed.—*The City of Lafayette, &c., v. Spencer et al.*, 399.
7. SPENCER v. RUSSELL, 9 Ind. R. 157, explained.—*Round v. The State ex rel. Riley et al.*, 493. See PRACTICE, 23.
8. The SCHOOL CASES explained, *Anderson v. The Kerns Draining Co.*, 199.
9. VANCLEAVE v. MILLIKEN, 13 Ind. R. 105, followed.—*Vail et al. v. Halton et al.*, 344.



## CATTLE.

See FENCES; RAILROAD COMPANY, 1, 2, 15.

## CHANCERY.

1. Where, in a proceeding in chancery under the former practice, there was no exception to the answer of heirs who were made parties in lieu of their deceased parent, and no other means was resorted to to test its sufficiency, but a replication was filed taking issue upon it, it was held that no objection could be raised in the Supreme Court on account of any variance between the answer of the original defendant and that of the heirs.—*Townsend et al. v. McIntosh et al.*, 57.
2. It was a rule of evidence in chancery proceedings, that the answer of one through whom others claim must be taken, as against them, to be *prima facie* true.—*Ibid.*
3. Under this rule, the answer of one through whom others claim would be considered as evidence against them, so far as the facts stated were relevant to the issues made upon their answer.—*Ibid.*
4. The complainant in chancery cannot introduce evidence tending to contradict a positive averment or charge in his bill.—*Ibid.*
5. Where the defendant does not profess to answer from his own knowledge, it did not require two witnesses to overcome a denial in his answer.—*Ibid.*
6. By §§ 15 and 16, B. S. 1843, p. 666, if issues of fact were evolved in a proceeding in chancery in the Probate Court, either party could demand a trial of them by jury as a matter of right, and the Court was bound by the verdict unless it was set aside. The language of the statute, though in form merely permissive, is in fact peremptory.—*Clem v. Durham et al.*, 263.
7. Where, upon the return of the verdict in such case, a motion was made to set it aside and grant a new trial, the evidence adduced upon the trial not being before the judge, the motion was held to have been properly overruled.—*Ibid.*
8. If in framing an issue of fact for trial by jury, in a chancery proceeding, the plaintiff reply to the answer, he admits it to be good, and confines the inquiry to the truth of the matters at issue. Such pleadings are conducted subject to the same rules as other chancery pleadings.—*Ibid.*

See TITLE TO REAL ESTATE.

## CERTIORARI.

See PRACTICE, 13.

## CITIES.

1. *Snyder v. The President, &c., of Rockport*, 6 Ind. R. 237, affirmed. *City of Lafayette, &c., v. Spencer et al.*, 399.
2. Sections 59 and 60 of the general act for the incorporation of cities, Acts of 1857, p. 61, do not entitle the owners of property that will be injured by street improvements to have compensation for such injury assessed and tendered before the contemplated improvements proceed.—*Ibid.*

## CLAIMS AGAINST THE STATE.

1. Claims for work done on contracts for draining swamp lands, are payable out of the swamp land fund alone.—*Dodd v. Miller et al.*, 433.

2. If there is no money in the treasury belonging to that fund, the auditor of state cannot issue his warrant for such a claim.—*Ibid.*
3. No money in the fund, is a good answer to an alternative writ of mandate to compel the auditor to issue a warrant for the payment of a claim.—*Ibid.*
4. The act of 1859, providing that the auditor shall not draw a warrant upon the treasurer unless there be money in the treasury belonging to the fund upon which the same is drawn, &c., does not take away any vested right of claimants for work done under the swamp land act.—*Ibid.*

## CLERICAL ERROR.

In a suit against several defendants only one of whom was served and appeared, an entry of judgment against the "defendants" instead of the "defendant," will be regarded as a clerical error, amendable in the Court below, and in the Supreme Court, so as to make the judgment operative against one only.—*Lemen et al. v. Young et al.*, 3.

## CLERKS OF CIRCUIT COURT.

See OFFICE, &c., 1, 6.

## COGNOVIT.

See JUDGMENT BY CONFESSION.

## COLLATERALS.

See PROMISSORY NOTES, 4.

## COMMISSIONS.

*By the Governor.*]

See OFFICE, &c., 2, 3.

## COMPLAINT.

See PLEADING, 11, 14, 15, 18, 19, 36, 38.

## CONCEALMENT OF CRIME.

See CRIMINAL LAW, 10 to 15, 32.

## CONCERTS.

See CONSTITUTIONAL LAW, 4, 5.

## CONDITION PRECEDENT.

*Waiver of.*]

See CONTRACT, 7.

## CONSIDERATION.

*Executory.*]

See PROMISSORY NOTES, 10.

See CONTRACT, 3, 11; PROMISSORY NOTES, 1, 6.

## CONSOLIDATION.

See CORPORATIONS, 15.

CONSTABLE.

*May purchase Judgment of Justice.*] See CONSTITUTIONAL LAW, 10.

CONSTITUTIONAL LAW.

1. Section 14 of article 4 of the constitution literally extends to criminal prosecutions only; but in its spirit and intent, it protects a person from a compulsory disclosure in a civil suit of facts which might subject him to a criminal prosecution.—*Wilkins et al. v. Malone*, 153.
2. But the statute providing that a person charged in a civil suit with taking illegal interest may be required to answer, and that his answer shall not be used against him in a criminal prosecution for usury, is not unconstitutional.—*Ibid.*
3. The section in question does not extend to mere penalties and forfeitures.—*Ibid.*
4. The subject of the act of 1857 entitled "An act to amend the first section of an act entitled 'An act concerning licenses to vend foreign merchandize, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet-show, and legerdemain,' approved June 15, 1852, and for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers," is licenses. The act is not unconstitutional for containing more than one subject.—*The State v. Bowers*, 195.
5. The title of that act does not embrace concerts; and an information will not lie, under the attempted provision of the act touching the exhibition of concerts without license.—*Ibid.*
6. Section 56 of the act for the incorporation of insurance companies, &c., approved June 17, 1852, and the act of 1855 amendatory of that section, are void—the section not being embraced by the title of the act.—*Igoe v. The State*, 239.
7. The first section of the act of 1852, "for the more uniform mode of doing township business," provides for the organization of townships. *Held*, that it is not void for inconsistency with the title of the act.—*Clinton Township v. Draper et al.*, 295.
8. The liquor act of 1859 is entitled "An act to regulate and license the sale of spirituous," &c., "liquors, to prevent the adulteration thereof, to repeal former laws," &c., "and to prescribe penalties," &c. *Held*, that the section of the act prohibiting the giving away intoxicating liquor to a minor is properly connected with the subject embraced by the title.—*The State v. Adamson*, 296.
9. The changing of the boundaries of existing counties, is a matter properly connected with the subject of forming new counties out of those existing.—*Haggard et al. v. Hawkins et al.*, 299.
10. Section 113 of the act touching justices of the peace, which provides that no constable shall purchase a judgment on the docket of any justice of his township, is not embraced by the title, nor properly connected with the subject, of the act, and is, therefore, void.—*Spaugh et al. v. Huffer*, 305.
11. The law authorizing judgment and execution without relief from valuation laws, where such relief is waived in the contract, is valid as to promissory notes and bills of exchange. *Quære*, whether upon other instruments containing such waiver, judgment can be rendered accordingly.—*Smith et al. v. Doggett et al.*, 442; *Baker v. Roberts*, 552; *Mahon v. Traber et al.*, 525.

See CORPORATIONS, 6, 7; COURT OF COMMON PLEAS, 1; CRIMINAL LAW, 21; INTERROGATORIES, 1; OFFICE, &c., 4, 5, 7; TAXES, 3 to 6, 8.

CONTINUANCE.

1. Indictment for murder. Affidavit for a continuance stating, in substance, that defendant could not go to trial at that term, on account of the absence of A., who had been duly

recognized to appear as a witness at that term, but who, from sickness, was unable to attend; that he could prove by said A. the following facts: "That he was going peaceably along the public highway, without making any hostile demonstration whatever, when the deceased commenced a violent assault upon him, and that the defendant told the deceased, in a friendly manner, not to strike him, and affiant receded from the deceased, and did not strike nor offer to strike him until after the deceased seized the affiant and commenced beating and kicking him with considerable violence; that as soon as affiant could release himself, he desisted from defending himself and retreated; that it was during the time that he was so beaten, seized, and kicked as aforesaid by the deceased, that affiant struck the blow which is charged to have caused the death of the deceased." The affidavit states that the facts thus set out are true, and that he cannot prove them by any other witness whose testimony can be as readily procured, and that the affidavit was not made for delay merely, &c. The affidavit of the husband of the witness was also filed, showing her inability to attend on account of sickness. *Held*, that a continuance should have been granted.—*Lofton v. The State*, 1.

2. The Court will scarcely tolerate a second application on the same ground, at the same term, for a continuance.—*McCorkle v. The State*, 39.
3. Where the plaintiff in vacation, after a continuance of the cause, filed an additional averment to his complaint, bringing in a new defendant, who answered setting up a new demand against the original defendant, it was held that the latter might have a continuance till the next day, or for a reasonable time, to enable him to answer; that the pleading was in the nature of a complaint; and that he did not waive error in refusing such continuance, by complying with an order to answer immediately.—*Meredith et al. v. Lackey*, 529.
4. The original defendant, in such case, answered, filing interrogatories without affidavit. The new defendant replied in denial, without answering the interrogatories. A rule was taken for such answers; but the record did not show the time within which they were to be filed. A bill of exceptions showed that the new defendant was absent at the time his reply was filed; but no motion was made for an attachment to compel such answers. *Held*, that the original defendant could not have a continuance to obtain such answers, without affidavit.—*Ibid.*

See COUNTY BOUNDARIES; CRIMINAL LAW, 44; INTERROGATORIES, 3.

### CONTRACT.

1. The Courts will not aid a party to rescind or annul an executed illegal contract.—*Nudd v. Burnett*, 25.
2. A person sold land, and agreed to receive in payment certain railroad stock, at a rate which the vendee represented it to be worth in the market. The vendor gave the vendee ten days to procure the necessary amount of stock, and having received the stock within that time, he delivered a deed. Nineteen months afterwards, having ascertained the stock to be worth less than the vendee represented to be its value, the vendor brought suit to rescind the contract, &c. *Held*, that he was too late, even if he could, at any time, have made a case for rescission.—*Barton et al. v. Simmons*, 49.
3. A written promise to pay a sum of money was assignable by indorsement under the statute of 1838, and, therefore, where no consideration for the promise was expressed, it was held that a valid consideration must be presumed.—*Tibbetts v. Thatcher*, 86.
4. A. contracted with B. for the purchase of all the wheat he, B., might raise on his farm for the current season, at a certain price per bushel. *Held*, that there was no implied warranty, on B.'s part, as to the quality or value of the wheat to be delivered.—*Davis v. Murphy*, 158.

5. An assignment of a contract vests in the assignee all the rights, and imposes upon him all the burdens and conditions, to which the assignor was entitled or subjected under the contract.—*Smith et al. v. Rogers et al.*, 224.
6. A. contracted with B. for 25,000 bushels of corn. B. had contracted with C. for 15,000 bushels. D. had contracted with C. for 4,000 bushels. A. afterwards assigned his contract to D., and guarantied the delivery of the 25,000 bushels. That contract contained a stipulation that the first corn received by A. from C. should be applied upon B.'s contract. C., with notice of the assignment, delivered 12,757 bushels to D., making no application of it to either contract. D. applied it, first, to his own contract with C. for 4,000 bushels, and the rest to B.'s contract with C. for 15,000 bushels. Held, in a suit by D. against A. upon the assignment and guaranty, that the 4,000 bushels applied by D. to his own contract with C. should have been applied upon B.'s contract.—*Ibid.*
7. Where a party has waived the performance of a condition precedent, and especially where such waiver has been acted upon, the failure to perform cannot be insisted upon as a forfeiture.—*Farley v. Farley*, 331.
8. Where a party to a contract treats it as unrescinded, and sues for a breach of it, he must set out the instrument, or a copy, as the foundation of his action. Aliter, where he treats it as rescinded, and sues to recover back money paid under it.—*Bales v Weddle*, 349.
9. If a party sells personal property, as a lot of hogs, to be delivered at a future time, it seems he may go into the market and buy them for delivery under the contract; but if, at the time of the contract, he represents that he then has the property on hand, and thereby obtains an advance of money thereon, when, in fact, he has not the property on hand, it is a fraud which will justify a rescission of the contract.—*Ibid.*
10. A contract for timber-trees, to be cut and taken away at the convenience of the purchaser, is complete, it seems, when the trees are marked.—*Wright v Schneider*, 527.
11. Where a party gets all the consideration he voluntarily and knowingly contracts for, he will not be allowed to say that he got no consideration.—*Baker v. Roberts*, 552.
12. A contract for 250 cords of "good, merchantable wood" is complied with by the delivery of 250 cords of wood of a quality, taking the whole lot together, such as is generally sold in the market.—*Blake v. Hedges*, 566.
13. If the jury, in a suit to enforce a contract, find for the defendant, they indirectly find that he has complied with the contract on his part, and that he has not consented to a rescission.—*Ibid.*
14. If in a suit upon a contract for the delivery of a merchantable article, the defendant prove delivery at the time, &c., and it be not shown that he afterwards sold the article to a third person, or appropriated it to his own use, or that he otherwise agreed to a rescission, a rescission is not established; and if the contract in such case be not rescinded, and the defendant be not in fault, the plaintiff cannot recover money advanced.—*Ibid.*
15. To defeat such a suit, it need not be shown that the defendant set the article apart, and abandoned it to the plaintiff, or kept it delivered up to the time of suit; though it might, perhaps, be necessary to enable the defendant to recover the price of the article.—*Ibid.*

See ACTION, 1; BANKS AND BANKING, 1; CORPORATIONS, 1, 2; DELAY OF PAYMENT; DELINQUENT LIST; DEMAND; EVIDENCE, 9; GUARANTY; HUSBAND AND WIFE, 8; INFANCY; MARITIME LIENS, 1 to 4; PLEADING, 7; PROMISSORY NOTES; SALE; TENDER; VENDOR AND PURCHASER, 1, 2, 3, 5, 6.

## CONVEYANCE.

*Of Chattels.]*

See PERSONAL PROPERTY.

*Of Real Estate.]* See DEED; DESCENT; MORTGAGE; TITLE TO REAL ESTATE; VENDOR AND PURCHASER, 1, 2, 4 to 7, 9, 10.

### CONVICTS.

See STATE PRISON.

### CORPORATIONS.

1. A contract with a party as a corporation, estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such.—*Jones v. The Cincinnati Type Foundry Co.*, 89.
2. If the style by which a party is contracted with is such as is usual in creating corporations viz., naming an ideality, but disclosing the name of no individual, as is usual in cases of simple partnership—it would seem to indicate, *prima facie*, a corporate existence.—*Ibid.*
3. A clause in the charter of a corporation authorizing the company to borrow money “on such terms as might be agreed upon between the parties,” empowers them to borrow at a rate of interest beyond that established by the general law.—*Morrison v. The Eaton, &c., Railroad Co.*, 110.
4. Section 284, 2 R. S. p. 93, lays down a general rule as to what shall be deemed competent evidence of the acts and proceedings of corporations, and what the force thereof, without reference to the place where the evidence may have been taken.—*Andrews v. The Ohio, &c., Railroad Co.*, 169.
5. Where the charter of a corporation limited the amount that should be called for upon a subscription of stock to 15 per cent. per annum, and 10 per cent. had been paid, a call was held to be sufficiently explicit without specifying a place of payment or the per cent. to be paid—time and place being fixed by the notice.—*Ibid.*
6. A draining company organized under the act of 1852, are not bound, upon an answer of *nul tiel corporation*, to prove upon the trial the existence of the corporation.—*Anderson v. The Kerns Draining Co.*, 199.
7. The act is not unconstitutional.—*Ibid.*
8. Where the name of the plaintiffs is such as might be probably adopted by a corporation, and the complaint does not show that they are not a corporation, they will be presumed to be a corporation with capacity to sue.—*O'Donald v. The Evansville, &c., Railroad Co.*, 259.
9. Where a power is given to a corporation by statute, and a time fixed within which the power must be exercised, the power fails at the expiration of the time.—*The Town of Williamsport, &c. v. Kent et al.*, 306.
10. The execution of a note to a corporation admits its corporate character.—*Blake v. Holley*, 383.
11. A corporation may authorize its proper officer to assign a note by delivery. Perhaps it would be within the general power of the officers of a railroad company to assign, in such manner as they deemed expedient, the choses in action of the company.—*Ibid.*
12. The fact that the charter of a corporation is annulled, after a note sued on has been legally assigned, would not deprive the plaintiff of a right already vested by a legal assignment of the note, when the company was possessed of the power to make such assignment.—*Ibid.*
13. *Nul tiel corporation* puts in issue the existence of the corporation, at least so far as to require proof of *user*; but where the suit is upon a contract other than of subscription for stock, in which the existence of the corporation is recognized, the party being estopped to deny the existence of the corporation, cannot require proof of it, because his admission is conclusive.—*Hubbard et ux v. Chappel*, 601.

14. If the name in which a contract is made imply a corporation *prima facie*, while, in fact, the company assume to be only a partnership, the fact may be shown.—*Ibid*.
15. In a suit by a corporation, it is no defense to allege a consolidation with a corporation of another state, unless the terms of consolidation or the dates or provisions of the statutes authorizing it are given.—*Ibid*.

See BANKS AND BANKING; RAILROAD COMPANY; TAXES, 1 to 7.

### COSTS.

1. Since the act of 1855, the jury cannot acquit a party of costs where they find him guilty.—*The State v. Sauvaine*, 21.
2. In actions for damages within § 398, 2 R. S. p. 127, where the recovery is less than five dollars, each party pays the costs made by himself, and cannot recover back the amount from the other, except that the plaintiff may recover an amount of his costs equal to the amount of damages recovered.—*Sinclair v. Roush*, 450.
3. In a suit before a justice, the defendant appeared and answered, setting up a set-off larger than the plaintiff's claim, but failed to appear at the trial. Judgment was rendered against him as by default, and he appealed to the Circuit Court, where he recovered a judgment against the plaintiff for the excess of the set-off over his claim. *Held*, that there was such an appearance as entitled the defendant to costs, the justice's judgment being reduced more than five dollars.—*Hall v. Reynolds*, 472.
4. Where the right to costs depends upon the evidence, and the evidence is not in the record; or where it depends upon the record, which itself does not show the ruling of the Court to have been wrong, the Supreme Court will presume the ruling to have been correct; but this rule has no application to a case where the defendant's right to costs depends upon his having reduced a justice's judgment more than 5 dollars.—*Ibid*.
5. If at the institution of a suit a writ of attachment issue, and the defendant fail to answer to it, and judgment is rendered against him, the costs of the writ are to be taxed against him with the costs of the cause.—*Hosier et al. v. Eliason*, 523.

See ASSAULT AND BATTERY, 3; ATTACHMENT, 2; COURT OF CONCILIATION, 1; EXECUTORS AND ADMINISTRATORS, 6; HUSBAND AND WIFE, 6; PLEADING, 7; TENDER, 3, 4; USURY, 3.

### COUNTER-AFFIDAVITS.

See NEW TRIAL, 5.

### COUNTY BOARD.

See COUNTY BOUNDARIES.

### COUNTY BOUNDARIES.

Complaint against a county board, alleging that a petition praying a change of the county boundary so as to include certain territory, supported by affidavits that the petitioners were residents of the territory in question, and a majority of the legal voters thereof, which petition and affidavits were made part of the complaint, had been rejected by the board, and the prayer thereof refused, and that the board had refused to order the petition to be filed, and the application to be continued to the next term, and praying a writ of *mandamus*. The complaint was sworn to by two persons. On motion, a writ to show cause, &c., embodying the complaint, was issued, to which a demurrer was sustained. *Held*, that this was error;

that the statute was substantially followed.—*Hawkins et al. v. The Board of Commissioners, &c.*, 521.

See CONSTITUTIONAL LAW, 9.

### COUNTY BUSINESS.

See DELINQUENT LIST.

### COURT OF COMMON PLEAS.

1. The act of 1859, entitled "An act to amend the third section of an act entitled 'An act to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for, the judges thereof,' and repealing sections 29 and 38 of said act," went through all the constitutional forms of legislation, and is a valid law.—*Coburn v. Dodd*, 347.
2. The salary provided for in the act is not to be paid until the judges are elected, commissioned, and qualified, as provided in the act; and it is payable out of the county, and not the state treasury.—*Ibid.*
3. By the act of 1859, the Common Pleas is vested with jurisdiction, in certain cases, of felonies. They are to be tried upon informations; but the trial is to be subject to all the incidents that might attend it in the Circuit Court. One of those incidents, in that Court, would be a separate trial, if demanded, to be granted as a matter of right.—*Johnson et al. v. The State*, 574.

See APPEAL, 7; JURISDICTION, 1, 2, 3, 5, 6, 8.

### COURT OF CONCILIATION.

1. A record of a Court of Conciliation may be given in evidence to the Court, upon a question as to costs, after the cause has been given to the jury.—*Wiseman v. Risinger*, 461.
2. The original of such record will be received instead of a copy.—*Ibid.*
3. If a party appear in a Court of conciliation, it cannot afterwards be objected that the record does not show that he had notice.—*Ibid.*

See ASSAULT AND BATTERY, 3.

### COVENANT.

1. In an action founded upon the covenants in a deed, a copy of the deed must be set out.—*Woodford v. Leavenworth*, 311.
2. To constitute a breach of a general covenant of warranty, there must have been an entire want of title in the grantor, or an eviction by a paramount title.—*Ibid.*
3. If a grantee accept a deed without sufficient covenants against incumbrances, he cannot recover for money paid in removing incumbrances, unless it was paid under such circumstances as to raise an implied assumpsit.—*Ibid.*

See PLEADING, 8; VENDOR AND PURCHASER, 6 to 9, 11.

### CRIMINAL LAW.

1. Where a defendant, to obviate the necessity of returning the indictment to the grand jury for a correction of the date at which the offense was laid as having been committed, consented to the correction in open Court, and to a waiver of record of all objection, and then



- pleaded to the indictment, and afterwards moved to quash on account of the correction, it was *held*, that the motion was correctly overruled.—*McCorkle v. The State*, 39.
2. The defendant, in a criminal case, may waive his right to be present when the witnesses are examined; and if he voluntarily absent himself without leave, he will be deemed to have done so.—*Ibid*.
  3. In this case, the defendant and his counsel having absented themselves, the Court issued a bench-warrant for the defendant, and after appointing counsel for the defendant, proceeded to the examination of witnesses in his absence. *Held*, that there was no error.—*Ibid*.
  4. The exact sums laid in an indictment for larceny as having been stolen, need not be proved.—*Ibid*.
  5. Where, upon the return of the verdict, it is explained to the prisoner, and he moves for a new trial and in arrest, and is fully heard upon the motions, he cannot object on appeal that he was not asked what he had to say why judgment should not be pronounced.—*Ibid*.
  6. If the defendant and his counsel, in a criminal case, voluntarily absent themselves for the purpose of defeating a trial, he cannot complain that his case was prejudiced with the jury by such absence.—*Ibid*.
  7. An indictment will not be quashed because found at an adjourned term of the Circuit Court.—*Ulmer v. The State*, 52.
  8. An accessory before the fact may be indicted and tried before the principal; but the indictment must aver the commission of the offense by the principal. The indictment in this case contains that averment. See opinion.—*Ibid*.
  9. It is necessary, in an indictment charging an offense committed without the statute of limitations, to show by averments that the case falls within the exceptions of the statute.—*Ibid*.
  10. The time of absence from the state, or of concealment, of the defendant, which may occur during the period of limitation fixed by the statute, must be added to that period.—*Ibid*.
  11. *Quære*, how the clause of the statute in relation to the concealment of the criminal, is to be construed.—*Ibid*.
  12. The jury may convict upon the testimony of an accomplice.—*Ibid*.
  13. The concealment of "the fact of the crime" which suspends the operation of the statute of limitation, must be a concealment of the fact that a crime has been committed, unconnected with the fact that the accused was the perpetrator.—*Jones v. The State*, 120.
  14. Such concealment must be the result of positive acts done by the accused, and calculated to prevent a discovery that the offense has been committed.—*Ibid*.
  15. And the indictment must specifically charge such acts of concealment.—*Ibid*.
  16. Indictment of a father for the murder of his infant child. The wife of the defendant, at the time the alleged crime was committed, was afterwards divorced. Her testimony was received touching the transaction as she witnessed it, without reference to any communication from her husband. After the evidence was all heard, and before the jury retired, the Court instructed the jury to disregard her testimony. The trial lasted three days. It was urged that the instruction of the Court could not remove from the mind of the jury the improper impressions made by the statements of the wife; and that at the end of the trial, it would be impossible for the jury to separate those impressions from those derived from the mass of testimony that had been heard. But *held*, upon ample authority, that there was no error. *Quære*, whether the testimony was competent.—*Joy v. The State*, 139.
  17. Upon cross-examination, a witness was asked whether, about the month of August, at Wabash, she had made certain statements to certain persons. *Held*, that time and place were not fixed with sufficient definiteness to lay the foundation for impeaching testimony.—*Ibid*.

18. A verdict in a criminal case may be received on *Sunday*. And if, upon its reception, the jury is discharged without objection, the right to poll the jury is waived.—*Ibid.*
19. The sheriff is not the proper officer to interrogate talesmen as to whether they have any conscientious scruples against finding a verdict of guilty, where the punishment would be death. But where the record did not show that any person otherwise competent was rejected by the sheriff because of such scruples, nor that he acted from corrupt motives, nor that any injury resulted to the defendant: *Held*, that there was no error.—*Ibid.*
20. Indictment in three counts—1. That defendant held the child in the flames, vapor and steam, issuing from burning brush in the fire-place, until fatal injuries were inflicted. 2. That fatal injuries were inflicted by blows. 3. Alleging both the acts. *Held*, that there was no inconsistency in the counts.—*Ibid.*
21. It is settled law in this state, that where a legal indictment has been returned by a competent grand jury to a Court having jurisdiction of the person and the offense, and the defendant has pleaded, and a traverse jury has been duly impaneled and sworn, and all the preliminary requisites of record are ready for the trial—the prisoner has been once put in jeopardy.—*Ibid.*
22. And, in such case, the prosecuting attorney cannot, even with the consent of the Court, enter a *not. pros.* and indict the defendant again for the same offense.—*Ibid.*
23. But when the indictment is so defective in form that if the defendant were found guilty he would be entitled to have any judgment which could be entered thereon against him reversed; or if the judge discover any defect after the trial has commenced which would render the verdict against the prisoner void or voidable; then the judge, upon his own motion, may stop the trial, and what may have transpired will be no bar to future proceedings; and the prosecuting attorney may *not. pros.* such indictment and procure a new one.—*Ibid.*
24. After a plea of not guilty has been entered, and a jury elected and sworn, it is entirely irregular, without a formal withdrawal of such plea, and a discharge of the panel, to entertain a motion to quash the indictment.—*Ibid.*
25. The right of a prisoner to be discharged because he has been once put in jeopardy, extends only to instances where that peril was really impending over him, “from the verdict that might be returned by the jury upon the matter in reference to which they might lawfully return such verdict.”—*Ibid.*
26. The Court is not authorized to compel an election where several counts of an indictment are for the same offense, stating it in different forms.—*Ibid.*
27. And where such election is ordered, it will be presumed that the indictment charged distinct offenses.—*Ibid.*
28. And when such election is made, no jeopardy can be incurred under counts not relied upon; but a *not. pros.* may be entered, as to such counts, and a new indictment found.—*Ibid.*
29. And further, where the defendant is charged in two counts, properly joined, but upon his own motion he procure an order for such election, which operates to withdraw one of the counts from the jury as fully as if it had charged a distinct offense, so that to that count no evidence can be directed if the trial progresses,—he waives any constitutional right that may have apparently attached, as to that count, just as he would have waived it if he had consented to a discharge of the jury, or, after verdict, moved for a new trial or in arrest.—*Ibid.*
30. When a receiver of stolen goods is tried before the thief, the state must prove, 1. The larceny by some thief; 2. The subsequent reception by the prisoner; 3. That he knew, at the time, that they were stolen. But the confessions of the thief are not competent evidence against the receiver.—*Reilly v. The State*, 217.

31. *It seems that where the statute defines the offense generally, and designates acts constituting it, the language of the statute may be substantially followed the crime; but where the particular acts are not designated, the act done must follow the language of the statute.*—*Malone v. The State*, 219.
32. Indictment for receiving stolen goods, alleging absence from the state and of the person so that process could not be served, &c., to avoid the limitation. Defendant permitted to prove that there was a conspiracy, with which the defendant was connected for the commission of this species of crime, and the jury was instructed to consider the evidence in connection with the concealment. *Held*, that this was error.—*Raikes v. The State*, 232. See §§ 13, 14, *supra*.
33. A prosecution for any part of a single crime, bars a further prosecution for the whole or a part of the same crime.—*Jackson v. The State*, 327.
34. An affidavit charging that A. maliciously injured a toll-gate, the property of B. value, &c., by then and there taking the same off the hinges, to the damage, &c., specifies the injury.—*The State v. Clevinger*, 366.
35. In crimes other than certain grades of homicides, voluntary drunkenness is not an excuse for the criminal act committed while the intoxication lasts, and being its immediate cause, such drunkenness being in itself a wrongful act.—*O'Herrin v. The State*, 420.
36. Though there be no actual criminal intent, in such case, the law may hold a person, by such construction, guilty of such intent.—*Ibid*.
37. The statute prescribes the same penalty for receiving stolen goods that it imposes for the theft.—*Maynard v. The State*, 427.
38. In a prosecution for disturbing a religious meeting, the question whether the meeting "met together" or dispersed, after the benediction, shall go to the jury, upon proper instructions as to the protection afforded by the statute.—*The State v. Snyder*, 431.
39. Keeping a gaming house may be a continuous act; and all the time which a person keeps such house prior to the prosecution, constitutes but one indivisible offense, punishable by one prosecution.—*The State v. Lindley*, 430.
40. But an information will not be quashed for the reason that the defendant has previously been tried upon an information charging the keeping of the same house for a certain period of time.—*Ibid*.
41. The Court, in such case, should proceed with the trial, until the evidence is taken, and then determine whether there was but one offense or two.—*Ibid*.
42. In this case, the whole record consisted of a certified order of the Common Pleas overruling a motion made by the appellant. That entry states that the defendant presented by her petition that she was indicted for grand larceny by the grand jury, and was then in jail, and that she voluntarily, in writing, submitted to the jurisdiction of the Court, and moved to be tried upon said charge, which motion was overruled, and she was accepted. Neither the indictment nor the written offer of submission are in the record. *Held*, that there was nothing, so far as the record shows, before the Court to justify its act understandingly in granting such motion; and, therefore, the ruling was reversed.—*Pearsoll v. The State*, 432.
43. An acquittal upon an indictment for burglary with intent to commit a larceny does not embrace an acquittal of the larceny.—*The State v. Warner*, 572.
44. In this case the cause was continued one term on the mere motion of the prosecutor, without giving the defendant a hearing, he being at the time confined in jail, and not brought into Court nor consulted as to the continuance. *Held*, that this was error.—*Wheeler v. The State*, 573.
45. Again, on the trial the witnesses were allowed to give in evidence the declaration of the defendant, that she was not the person who committed the crime.

person upon whom the offense, for which the prosecution was instituted, was committed, as to the transaction, and that he thought it was committed by the defendant. These declarations were made some time after the act done, and were not dying declarations. *Held*, that this was error.—*Ibid*.

46. In an information for maliciously killing horses, an allegation of the manner of the killing is surplusage.—*Haworth v. The State*, 590.

47. *Quære*, whether duplicity in such an information is a ground for quashal under the code.—*Ibid*.

48. Where injuries to two animals are alleged to have been inflicted at the same time and place, but one offense is charged, and there is no duplicity.—*Ibid*.

49. If the jury, in such case, find the defendant guilty as to one animal, and say nothing as to the other, they acquit as to the latter.—*Ibid*.

See ASSAULT AND BATTERY; BASTARDY; CONSTITUTIONAL LAW, 1; COURT OF COMMON PLEAS, 3; EVIDENCE, 19; INDICTMENT; INFORMATION; JURY; LARCENY; LIMITATIONS, 3; LIQUOR LAW; MALICIOUS TRESPASS; MARRIAGE, CERTIFICATE OF; NUISANCE; PRACTICE, 13; SUNDAY LAW; USURY, 1, 2, 4; VARIANCE, 2; VERDICT, 2; WITNESS, 2.

## D.

### DAMAGES.

Where the amount of damages could be ascertained by mere computation, and the jury having failed to make an assessment, the Court assessed the damages, it was *held*, that, the merits of the cause having been properly determined, the judgment would not be reversed.—*Medler v. Hiatt*, 405.

See LANDLORD AND TENANT; MALPRACTICE OF A PHYSICIAN, 5, 6; SEDUCTION, 1.

### DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; PERSONAL PROPERTY.

### DEED.

1. The certificate of acknowledgment of a deed was not bad, under the statute of 1838, for not stating that the wife was examined separate and apart from her husband, and the contents of the deed made known to her, as it is presumed, the contrary not appearing, that the officer taking the acknowledgement did his duty in this regard.—*Fleming et al. v. Potter et al.*, 486.

2. An allegation that a person sold and conveyed land by deed, imports a conveyance in fee.—*Ibid*.

*Of Assignment.*] See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 3.

See COVENANT; DOWER; PLEADING, 28; TRUSTS; VENDOR AND PURCHASER, 2, 4 to 11.

### DEFAULT.

*Motion to set aside.*] See PRACTICE, 20, 21, 22.

See JUDGMENT BY DEFAULT; PLEADING, 39.

### DELAY OF PAYMENT.

Where a person purchases property, and is to have a delay of payment upon executing his

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notes, if he fails to execute his notes the purchase-money is due immediately.—*Weatherman*, 341.

### DELINQUENT LIST.

1. The county auditor is authorized by statute to make a special contract with the proprietor of a newspaper for the publication of the delinquent list; and the county board, in making an allowance for such publication, must be governed by the amount which the auditor has agreed to pay.—*The Board of Commissioners, &c., v. Kierolf et al.*, 284
2. And if an appeal be taken, upon the affidavit of a person aggrieved by such allowance, cannot be proved upon the trial that the list could have been published for an amount less than the allowance.—*Ibid.*

### DELIVERY.

*Of Receipt.]*

See ASSIGNMENT.

### DEMAND.

In actions on contract, where a demand is necessary before suit, the failure to make a demand is excused by an averment showing that the defendant is not in a condition to perform or offer to perform.—*Wilstach v. Hawkins*, 541.

### DEMURRER.

*Upon New Trial Granted.]*

See PRACTICE, 25.

See PLEADING, 3, 4, 10, 28, 33, 37.

### DEPOSIT.

*H.* sued the appellees for money deposited. Answer, 1. A denial. 2. Admitting that the money was left with *K.* as an individual, averring that it was by him paid to *E.* for the use of *H.*, and denying a deposit of said money, &c. 3. Admitting that the money was deposited with *K.*, and averring that plaintiff was indebted to defendants, and that the money was deposited on such indebtedness, &c. Reply in denial. Trial, verdict and judgment for the defendants. There were several special findings upon points submitted to the jury. Plaintiff moved that a judgment be rendered in his favor on those special findings, notwithstanding the general verdict. The motion was overruled. Those findings were, in substance, that no money was deposited with the defendants, nor with *K.*, but that it was left with *H.* without directions as to its application; that no directions were given to pay it to *E.* to apply it on any debt due *K.*, or *K.* and *L.* The evidence shows that *K.* was the agent of *E.* for the sale of certain lands and receipt of the price, &c. It also tends to show that *H.* was indebted to *E.* for lands purchased by another person, but which had passed through the hands of *H.*, and through him into the hands of *K.*; and that *K.*, after the money was paid to him, had paid on that debt, to *E.* for *H.* a greater sum than the amount so payable by *H.* Questions are raised upon instructions given and refused as to the right of *E.* to the money without positive instructions to that effect from *H.* Held, that there was no error.—*Haines v. Kent et al.*, 510.

### DEPOSITIONS.

See APPEARANCE, 2.

## DESCENT.

1. Section 18 of the act regulating descents, &c., should not be so construed as to prevent a widow who marries a second or subsequent time, from directing which of two pieces of land shall be sold on execution to pay a debt which must be paid by the sale, independent of her consent, of one or the other.—*Blackleach et ux. v. Harvey*, 564.
2. *It seems*, that that section should only be applied in restraint of the right of the wife to convey her real estate in fee simple, while she has children living by a former husband who might inherit it.—*Ibid.*

## DISCOUNT.

See **BILLS OF EXCHANGE**, 1; **PLEADING**, 32.

## DIVORCE.

See **HUSBAND AND WIFE**, 1.

## DOWER.

A widow cannot claim dower in premises by virtue of the seizin of her husband, under a deed which, from the failure to have it recorded, became void, as against subsequent purchasers, and which, being unable to pay the purchase-money, he surrendered to the grantor, as a means of returning the land in discharge of the original consideration.—*Talbot et al. v. Armstrong et al.*, 254.

See **WILL**, 2.

## DRAINING COMPANIES.

See **CORPORATIONS**, 6, 7; **TAXES** 3 to 6.

## DRUNKENNESS.

*Excuse for Crime.*]

See **CRIMINAL LAW**, 35, 36.

## DUPLICITY.

See **CRIMINAL LAW**, 47, 48; **INDICTMENT**.

## E.

## EATON AND HAMILTON RAILROAD COMPANY.

*Loan by.*]

See **CORPORATIONS**, 3.

## ELECTION.

See **OFFICE, &c.**, 4.

## ELIGIBILITY.

See **OFFICE, &c.**, 4, 5.

## ENCLOSURES.

See **FENCES**.

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### ENTRY OF RECORD.

*Nunc Pro Tunc.*]

See PRACTICE, 13.

*To the Satisfaction of Court.*]

See PRACTICE, 24.

### ERROR.

1. If the record does not show any amendment of the pleadings, it will be presumed that an amendment assigned for error was correctly made.—*Rooker et al. v. Wise*, 1.
2. Where the record contains no replication, it cannot be assigned for error that the court permitted a replication to be filed after trial and judgment.—*Ibid.*

*Joinder in.*]

See APPEAL, 9.

See PRACTICE, 4, 17, 19; VENUE.

### ESTOPPEL.

See CORPORATIONS, 1; EVIDENCE, 12; PLEADING, 30, 31; PROMISSORY  
SCHOOL LANDS.

### EVICTIION.

See VENDOR AND PURCHASER, 9, 10.

### EVIDENCE.

1. Prosecution for the larceny of one 5 dollar bank bill on the bank of *Pittsburgh*, of the value of 5 dollars, and four 1 dollar bank bills, of the value of 4 dollars, on banks to the prosecution unknown. The only proof of the genuineness of the bills and of the existence of the banks on which they purported to be, was the testimony of the person from whom they were stolen, and who appeared to have been a business man. *Held*, that this evidence proved the existence of the banks and the genuineness of the bills, and fairly raised questions for the jury. These are points not requiring the highest degree of proof.—*Clark v. The State*, 26.
2. Evidence that the matters for which the suit is brought had been submitted to an arbitrator who had made an award in favor of the plaintiff, is irrelevant under the general issue of arbitration and award, if relied upon, must be specially pleaded.—*Brown v. The State*, 1.
3. Where a notary public in a foreign state has, by the state law, authority to administer oaths, § 281, 2 R. S. p. 91, makes such certificate presumptive evidence of the truth of the facts stated.—*Andrews v. The Ohio, &c., Railroad Co.*, 169.
4. In a suit upon a subscription of stock, a witness for defendant, upon cross-examination, was asked whether the subscription was not first made "for the purpose of securing a location on the *Broadhead* survey." *Held*, that the question was not leading.—*The Ohio, &c., Railroad Co.*, 174.
5. Suit by the assignees upon the assignment of a note. Averment that one of the makers was insolvent, &c., and that judgment had been duly recovered and execution returned no property found, &c., as to the other. Answer, first, general denial that diligence had not been used against the makers, &c. Upon the trial testimony that one of the makers was insolvent. The record of a judgment against the makers, and the memorandum thereon of the justice that an execution had issued and returned no property found, was given in evidence. *Held*, that the execution was competent to be introduced or accounted for.—*Williams et al. v. Case et al.*, 253.

6. Whether an instrument is forged or not, is a question for the jury; and no proof of its forgery is necessary before it is offered as evidence.—*Mosher v. The State*, 261.
7. It seems that the identity of papers taken upon the body of a prisoner may be sufficiently proved, without identifying any particular paper, by the officers taking and having them in charge.—*Ibid.*
8. The Supreme Court cannot determine whether such papers were proper evidence, or whether the admission of them as evidence injured the defendant, unless the papers are before the Court.—*Ibid.*
9. Where a writing in the form of a receipt is the mere acknowledgement of the payment of money, or the delivery of a thing, it is but *prima facie* evidence of the fact; but if it also contain a contract to do something in relation to the thing delivered, in so far as it is evidence of that contract between the parties, it stands upon the footing of all contracts in writing, and cannot be contradicted or varied by parol; except, perhaps, that at law the same circumstances of fraud, mistake, or surprise may be shown to set it aside as might be shown in equity to relieve from a contract.—*Dale v. Evans et al.*, 388.
10. The statute laws of another state of the *United States* cannot be proved by parol. They must be evidenced by certified copies from the secretary of state, or by a copy printed by state authority.—*Line v. Mack et al.*, 330.
11. The Court has a discretion as to the manner of proving statute laws of nations foreign to the *United States*.—*Ibid.*
12. Where the land of a person is sold at guardian's sale, though the record does not show such person to have legally been made a party, still if there had been a reception of the purchase-money, and such acquiescence as amounts to an equitable estoppel, the record of the sale and of the final report, &c., of the guardian may be given in evidence, upon a suit to recover possession of the land, as a link in the chain necessary to make out the defense.
13. In a suit for the recovery of real estate, all legal or equitable defenses, by the act of 1855, may be given in evidence under the general denial.—*Vail et al. v. Halton, et al.*, 344.
14. In an action for damages, the opinion of a witness as to the amount of damages sustained by the plaintiff, is inadmissible.—*Sinclair v. Roush*, 450.
15. *Aliter*, as to experts, and persons acquainted with the value of particular property.—*Ibid.*
16. Suit upon a subscription of stock. Answer, 1. Fraud in this, that the soliciting agent represented that in the book he produced there were articles of agreement by which the subscriber might pay for stock in money or in ties for the road at the rate of, &c., and the defendant relying, &c., subscribed without reading, &c., and that said representations were false. 2. That a verbal entire contract was made, a part only of which was reduced to writing; that it was agreed the defendant should subscribe two shares, and might pay the same in ties at the rate of, &c., on demand, and the part reduced to writing is that stated in the complaint, and the other part defendant demands to prove by parol. The latter was for the payment of money absolutely, upon call. Held, 1. That the representations were not peculiarly within the knowledge of the plaintiffs, nor such as the defendant might rely upon. 2. That the demand to make parol proof was, in effect, a demand to contradict or vary a written instrument by proof of a verbal contemporaneous agreement, which cannot be done.—*Thornburgh v. The Newcastle, &c., Railroad Co.*, 499.
17. Upon the introduction of a record in evidence, it is usually read to the jury by the witness having it in charge, or by an attorney in the cause. It need not be handed to each juror, unless inspection for a particular purpose is necessary.—*Ibid.*
18. It cannot be proved collaterally that a railroad company has not expended 5 per cent. within three years, as required by the statute.—*Ibid.*



19. Upon an indictment against *A.* and two others unknown, for an assault and battery with intent to rob, the state was permitted to prove that during the afternoon and evening preceding the assault, which was about nine o'clock at night, the defendant and *B.* and *C.* were seen together, and that upon these persons being brought into the presence of the prosecuting witness next day, defendant and *B.* were partially recognized, as two who were present, engaged in the crime; but the principal witness did not implicate nor mention *B.* or *C.* The defendant having shown that *B.* and *C.* went to their room at half after eight o'clock, offered to prove that *B.* was in bed at the time of the assault, &c. *Held*, that this evidence should have been heard.—*Rowland v. The State*, 575.

See ASSAULT AND BATTERY, 4; ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; BASTARDY, 3; CHANCERY 2 to 5; CORPORATIONS, 4; COURT OF CONCILIATION, 1, 2; CRIMINAL LAW, 16, 17, 30, 32, 45; MORTGAGE, 7, 8; NEW TRIAL, 14; NUISANCE, 5, 6; PLEADING, 7, 23; PROMISSORY NOTES, 13; RAILROAD COMPANY, 1, 3, 6, 7, 9; SEDUCTION, 2, 3; SET-OFF, 3; WITNESS.

### EXCEPTIONS.

1. No exception having been taken in this case to any ruling of the Court below, no question is presented in the Supreme Court.—*Walcott v. Patterson, et al.*, 248.
2. The error assigned in this case was, that the Court rendered judgment for the appellees on a demand not due when the suit was brought. No exception was taken to any ruling upon the pleading, the admission of evidence, or instructions to the jury. There was one good count in the complaint. *Held*, that there was no error.—*Halderman v. Birdsall et al.*, 304.
3. An *amicus curiæ* cannot except.—*Darlington v. Warner*, 449.

See NEW TRIAL, 9.

### EXECUTION.

See HUSBAND AND WIFE, 7; REPLEVIN BAIL; SHERIFF; SURETYSHIP, 2; TAXES, 11.

### EXECUTORS AND ADMINISTRATORS.

1. As a general rule, an administrator, upon a sale of the intestate's property, cannot receive in payment anything but money.—*Chanler v. Schoonover*, 324.
2. He cannot apply the proceeds of such sale upon his individual debts.—*Ibid*.
3. Thus, the purchaser of a lot at an administrator's sale, credited the amount of the notes for the purchase-money, with interest, on a note held by him upon the administrator, and the latter surrendered the notes for the purchase-money, and made a deed. *Held*, that this was no payment; and that an action by an administrator *de bonis non*, would lie to recover the purchase-money, or set aside the sale.—*Ibid*.
4. If the right of a foreign executor to sue as such be not denied by an answer under oath, it is admitted, and he need offer no proof of his appointment.—*Matlock v. Powell*, 378.
5. The failure of an administrator to file a second bond, upon obtaining an order for the sale of real estate, he and the Court supposing, though erroneously, that the statute had been complied with, will not render void a sale regularly made and confirmed, if the money received is faithfully accounted for.—*Foster v. Birch et al.*, 445.
6. Complaint by *A.*, administratrix, against *B.* as executor of his own wrong, for intermeddling, &c., laying the acts on the 6th of November. Answer, 1. A general denial; 2. A denial, and averment of property in defendant; 3. Denial that he was executor, &c. Reply in denial. After the evidence had been heard and the argument began, the plaintiff was

permitted to amend the complaint by striking out *November* and inserting *October*. The evidence showed that the deceased died on the 2d of *October*, and that the plaintiff obtained letters on the 30th of that month. The jury found specially that the defendant intermeddled at all times after the death of the decedent until the last of *November*.

*Held*, first, that the time laid should bring the case within the statute of limitations, and that the evidence should, perhaps, show that the acts complained of preceded the grant of letters, &c.

Second, that the amendment met the evidence, and did not change either claim or defense.

Third, that the costs prior to the amendment were properly charged against the defendant.—*Sipe v. Sipe*, 477.

7. If, in a suit against an executor, upon a claim against a decedent's estate, the record recites that the claim was duly entered on the appearance-docket, &c., ten days prior to the first day of the term, the defendant will be held to have had sufficient notice.—*Round v. The State ex rel. Riley et al.*, 493.

See JURISDICTION, 3, 5; PLEADING, 19; WILL, 1.

#### EXPERTS.

See EVIDENCE, 14, 15.

#### F.

#### FENCES.

1. At common law, and in the absence of any controlling statute, the owner of cattle is bound to confine them upon his own land.—*Brady et al. v. Ball*, 317.
2. The second section of the act concerning inclosures, &c. (1 R. S. p. 292), prohibiting a recovery for animals breaking into an inclosure, unless the fence is lawful, applies only to outside fences.—*Ibid*.
3. Thus in an action for damages for a trespass by animals breaking through a partition fence, it is no defense that the fence was insufficient.—*Ibid*.

See RAILROAD COMPANY, 1, 2, 15.

#### FINDING.

See VERDICT.

#### FOREIGN COMMISSIONERS.

A commissioner in a foreign state, appointed under the statute of 1852, is authorized to administer oaths, and certify affidavits.—*Andrews v. The Ohio, &c., Railroad Co.*, 169.

#### FOREIGN EXECUTOR.

See EXECUTORS AND ADMINISTRATORS, 4.

#### FORGERY.

See EVIDENCE, 6.

#### FORNICATION.

See ADULTERY.

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### FRAUD.

See CONTRACT, 9; PLEADING, 8.

### FRAUDS, STATUTE OF.

See HUSBAND AND WIFE, 8; TRUSTS.

### FRAUDULENT CONVEYANCE.

See PLEADING, 10.

## G.

### GAMING.

See CRIMINAL LAW, 39, 40, 41; INFORMATION, 1; SUNDAY LAW.

### GOVERNOR.

*Commissions by.*]

See OFFICE, &c., 2, 3.

### GUARANTY.

The liability of a guarantor is measured by that of his principal, unless he expresses a less or a greater liability.—*Smith et al. v. Rogers et al.*, 224.

See CONTRACT, 6.

### GUARDIAN.

See JURISDICTION, 5; WILL, 1.

## H.

### HUSBAND AND WIFE.

1. If a *feme covert* obtain a divorce and alimony, she has no interest, as survivor of the husband.—*Chenoweth v. Chenoweth*, 2.
2. Where a legacy in the hands of the guardian of a married woman was used to purchase land, and the deed was made to her husband, with the parol understanding that the land was purchased for the wife, it was *held*, HANNA, J., that the purchase-money was not the separate property of the wife, and that there was consequently, no resulting trust in her favor.—*Miller et al. v. Blackburn*, 62.
3. *Resor v. Resor*, 9 Ind. R. 347, distinguished from this case.—*Ibid.*
4. The investment of the wife's legacy in real estate, taking the deed in the husband's name, and his subsequent disposition of the same estate by will, operated as a release of the husband's possession of money to which he was entitled in right of his wife.—*Ibid.*
5. At common law, where the real estate of the wife is sold by the husband for money or personal property received therefor by the husband, vests absolutely in him. The statute (Acts of 1853, p. 57,) does not change the rule, as to property acquired by the wife by purchase.—*Mahoney v. Bland*, 176.
6. A wife filed an affidavit for surety of the peace against certain persons, and was recognized to appear before the Common Pleas, where, on the calling of the case,

to appear; whereupon judgment was rendered against her husband for costs. *Held*, that this was error.—*Bolle v. The State*, 376.

7. If a wife, in anticipation of the issues of her separate real property, purchase personal property, and execute a promissory note therefor jointly with her husband, the property may be taken on execution against the latter.—*Johnson et ux. v. Chissom*, 415.

8. Suit by a widow against the administrator to recover 300 dollars, under § 21 of the act regulating descents. Answer, that the plaintiff, prior to her marriage with the decedent, was a widow, and had children by a former husband, and was possessed of property, real and personal, acquired by her former marriage, and the decedent was a widower having children by a former marriage, and also property acquired by such former marriage; that before their marriage, and in view of the same, in order that their contemplated marriage might not effect any change in their respective rights to the property, and that the same might descend to the children of each, as though no marriage had taken place, it was verbally agreed that the decedent should pay to the plaintiff, during coverture, one-third of the net profits of his lands for her use, independent of his control, and claim no right to the use or control of her separate property during coverture, or afterwards, but let it all go to her children by her former marriage, if not otherwise disposed of by her; and in consideration of the foregoing, the plaintiff relinquished all claim to any portion whatever of her said intended husband's estate after his death, but agreed that it should all go to his children by a former marriage, if not otherwise disposed of by him.

*Held*, first, that this agreement may be regarded as fully executed by both parties.

Second, that it was liberal to the wife, and not void for being by parol.

Third, that it might have been valid if made during coverture.

Fourth, that it was not void by the statute of limitations, because not to be performed within a year.

Fifth, that it was always competent for the husband, by an antenuptial contract, to purchase his wife's personal fortune; and consequently he may buy her interest in his own.

Sixth, antenuptial contracts to be executed after the marriage has been determined, are not destroyed by the marriage.—*Houghton v. Houghton*, 505.

9. A wife may be bound by the acts of her husband in reference to her separate property, where such acts are done by her authority and approved by her.—*Baker v. Roberts*, 552.

See DESCENT; MALPRACTICE OF A PHYSICIAN; VENDOR AND PURCHASER, 4.

## I.

### INCUMBRANCE.

See COVENANT, 3; VENDOR AND PURCHASER, 8, 9, 11.

### INDICTMENT.

1. Indictment as follows: State of *Indiana*, &c. The grand jury, &c., charge that *J. F.* (and twelve others, naming them), on, &c., at, &c., did then and there willfully, purposely, feloniously, and of their malice aforethought, make and perpetrate an assault on the body of *B. M.*, in the peace, &c., and then and there with pistols, guns, rocks, and clubs, which they, the said *J. F.*, &c., in their hands then and there had and held, did willfully, feloniously purposely, and of their malice aforethought, then and there strike, beat, bruise, and wound the said *B. M.*, with intent, &c., to kill and murder her, &c.

*Held*, first, that the indictment is not double.

## INDEX.

Second, that it charges all the persons named with using all the weapons mentioned in that regard sufficient.

Third, that the assault and battery is sufficiently charged; and that, with proper intent, is all that is necessary under the statute. The injury done is with sufficient particularity.—*The State v. Farley et al.*, 23.

2. Indictment, containing two counts, charging the defendant with stealing stolen goods. Time, place, value, &c., are stated in the second count, by way to the first, in which they are definitely given. The defendant was convicted and acquitted on the first count of the indictment. It is contended there was no second count. *Held*, that this is not so.—*Maynard v. The State*, 427.

Return of.]

See PRACTICE, 18.

See CRIMINAL LAW, 1, 7 to 10, 15, 20, 23, 26 to 29, 31.

## INDORSEMENT.

See ASSIGNMENT; PROMISSORY NOTES, 8, 9.

## INFANCY.

The disability of an infant to make a valid, binding contract, is a personal privilege for the benefit of the infant himself, and none but he, or his representatives, can waive such disability.—*Frazier et al. v. Massey*, 382.

See LIQUOR LAW; PROMISSORY NOTES, 9; WILL.

## INFORMATION.

1. An information for keeping a house for gaming, is not bad for not giving the persons who gambled.—*Carpenter v. The State*, 109.

2. An information must be based upon an affidavit first filed. It is not sufficient if the information itself is verified.—*Ibid*.

3. "Posey Common Pleas Court, June term, A. D. 1859. *State of Indiana v. Thomas J. Malone*. Usury. The state of Indiana by William P. Edson, district prosecuting attorney, here gives the Court to understand and be informed that, on the 8th day of December, 1857, at and in said county of Posey, Thomas J. Malone did then and there obtain, gain for, exact, reserve, and receive from Sharp Wilkins, the sum of 90 dollars, on loan, use, and forbearance of 600 dollars, lent by said Thomas J. Malone to him, Sharp Wilkins, from the 8th day of December, A. D. 1857, to the 8th day of December, 1858, which said sum of 90 dollars so as aforesaid bargained for, exacted, reserved, exceeds the rate of 6 dollars for the use and forbearance of 100 dollars for a large sum, to-wit, 54 dollars, and is more than at that time was allowed by law to the form of the statute in such case made and provided, and against the penalty of the state of Indiana. William P. Edson, district attorney prosecutor.'

*Held*, first, that defect of title is not ground of quashal.

Second, that the signature is proper.

Third, that the venue is sufficient.

Fourth, that the information is substantially in the language of the statute, which is—*Malone v. The State*, 219.

4. If the affidavit is bad, the information, though otherwise sufficient, will be quashed.—*State v. Gartrell*, 280.

5. An affidavit sworn to upon the belief of the affiant, is equivalent to one sworn to in absolute and direct terms, and will support an information in the Common Pleas.—*The State v. Ellison*, 380.

See CRIMINAL LAW, 46, 47, 48; MARRIAGE, CERTIFICATE OF; NUISANCE, 1; USURY, 4.

### INJUNCTION.

See VENDOR AND PURCHASER, 8.

### INSTALLMENTS.

See PLEADING, 30, 31.

### INSTRUCTIONS TO THE JURY.

1. Where only a general objection is taken to the ruling on instructions, and they are as favorable to the appellant as he has a right to ask, the objection will not be noticed.—*Sipe v. Sipe*, 477.
2. Where the evidence is in the record, it may control the judgment without regard to irrelevant instructions.—*Blake v. Hedges*, 566.
3. Where the record does not purport to contain all the evidence, nor allege that the evidence in the record was all the evidence given in the cause, instructions refused must be presumed to have been refused as impertinent; and those given, if right under any state of facts that might have been proved, must be presumed to have been given upon such a state of facts.—*Stump v. Hart et al.*, 438.

See NEW TRIAL, 11; PRACTICE, 17, 19.

### INSURANCE COMPANIES.

See CONSTITUTIONAL LAW, 6.

### INTEREST.

See CORPORATIONS, 8; TENDER, 1; USURY.

### INTERLOCUTORY JUDGMENT.

See PRACTICE, 1.

### INTERROGATORIES.

1. Action for criminal intercourse with *Eleanor*, the plaintiff's wife. Answer in denial, and propounding interrogatories, and among others this: "How often within the last five years did you carnally know any woman or girl, other than said *Eleanor*?" which was stricken out on motion. *Held*, that this was not error; that the plaintiff could not be compelled to answer, for the reason that his answer might expose or tend to expose him to a criminal prosecution under the statute against living in open and notorious adultery or fornication.—*French v. Venneman*, 282.
2. Where the defendant answered and filed interrogatories, and took a rule generally for a reply, and the plaintiff replied without answering the interrogatories: *Held*, that the cause could not be dismissed because the interrogatories were not answered.—*McNamara v. Ellis*, 516.

## INDEX.

3. Upon affidavit by the plaintiff's attorney that the plaintiff is a non-resident, & against him to answer interrogatories may be stricken out; and the overruling by defendant for a continuance till the next day to enable him to file an affidavit of materiality of such answers, is not an abuse of discretion, where it appears taking for costs that the plaintiff was a non-resident.—*Parish et al. v. Heikes*, 6

See CONTINUANCE, 4; PROMISSORY NOTES, 11.

## ISSUE.

*Trial without.]*

See PRACTICE, 1, 12.

*Relief granted.]*

See PRACTICE, 27.

See CHANCERY, 6, 7, 8.

## J.

## JEOPARDY.

*When once incurred.]*

See CRIMINAL LAW, 21, 25, 28.

## JOINDER OF CAUSES OF ACTION.

In a suit for the correction of a mistake in a deed, the additional remedy of quieting title may be had, if the facts stated in the complaint justify it. In a suit upon a mortgage, the remedy of correction and foreclosure may be had upon a proper complaint.—*H. Coy*, 528.

*Action Pending.]*

See PLEADING, 40.

## JUDGMENT.

1. Where the contracts concerning which matters of difference submitted to arbitration did not waive relief from the appraisement law, but a clause in the arbitration provided that the award might be made a rule of Court, and judgment entered with *held*, that, under the statute of 1843, judgment was properly so rendered.—*D. et al.*, 7.
2. Complaint to foreclose a mortgage. Judgment for the plaintiff; an order that to pay, &c., so much of the mortgaged premises as might be necessary therefor lands are sold on execution, to make the judgment, &c. *Held*, that the form of judgment was right.—*Little et al. v. Vance*, 19.
3. Suit against a railroad company for work and labor. Process duly served. The confessed judgment through a power of attorney, which recites that it was executed pursuant to a resolution of the board of directors, conferring the power upon the president and secretary to make it. The president made oath that the judgment was not confessed for fraud creditors. The judgment was rendered without relief, &c. *Held*, that nothing authorizing judgment without relief; but that a *prima facie* case authorizing confession was made out.—*The Cincinnati, Peru, &c., Railroad Co. v. Walker*, 3.
4. A judgment rendered upon the same cause of action by a foreign Court which is in conformity with the dictum of the subject-matter and the parties may be set up in bar of a suit in this Court.—*The Cincinnati, Union, &c., Railroad Co. v. Wynne et al.*, 385.
5. Persons not parties to a judgment cannot maintain proceedings to review it or to set it aside.—*Cassel v. Case et al.*, 393.
6. The widow and heirs of a decedent cannot maintain proceedings to have letters

istration revoked, and a sale of the decedent's lands set aside, on account of alleged fraud and collusion in the recovery of a judgment, to which they were not parties, and for the payment of which the sale was made.—*Ibid.*

<i>Entry of.]</i>	See CLERICAL ERROR.
<i>Constable may purchase.]</i>	See CONSTITUTIONAL LAW, 10.
<i>Without Relief, &amp;c.,]</i>	See CONSTITUTIONAL LAW, 11.
<i>On the Pleadings.]</i>	See PLEADING, 9.
<i>Transcript of Foreign.]</i>	See PLEADING, 15.
<i>Over General Issue Untried.]</i>	See PLEADING, 16, 17.
<i>Copy to be filed.]</i>	See PLEADING, 27.
<i>Interlocutory.]</i>	See PRACTICE, 1.

See JUDGMENT BY CONFESSION; JUDGMENT BY DEFAULT; LIEN, 1; MORTGAGE, 3; PLEADING, 25; PRACTICE, 6, 29; SURETYSHIP, 2; USURY, 3; VENDOR AND PURCHASER, 11.

### JUDGMENT BY CONFESSION.

In order that the cause of action may be taken as confessed, on the ground that the defendant has been subpoenaed and refuses to appear, it should be shown, under § 48, 2 R. S. p. 459, that he was personally subpoenaed.—*Maulsby v. Wolf*, 457.

See JUDGMENT, 3; TENDER, 3.

### JUDGMENT BY DEFAULT.

1. A party may be relieved from a judgment taken by default, where he had not actual notice of the suit, and was, at the time of constructive service of the process, and until after the expiration of the term of the Court at which the judgment was rendered, absent from the state, and physically unable to return.—*Sage v. Matheny*, 369.
2. If upon the overruling of a demurrer to the petition for such relief, the Court set aside the default, without first ordering the plaintiff to plead over, he cannot assign the ruling as error unless the record show that the Court refused to permit him to plead over.—*Ibid.*
3. A judgment by default will not be reversed, unless the party defaulted take proper steps in the Court below to relieve himself from the judgment.—*Darlington v. Warner*, 449.

### JURISDICTION.

1. In this suit, the amount claimed and recovered was for 1,000 dollars. *Held*, that the Court had no jurisdiction.—*May et al. v. Crawford*, 5.
2. Where the judge of the Common Pleas is counsel in a case cognizable in that Court, the suit ought to be brought in the Circuit Court.—*Pavy et al. v. Ramsey*, 5.
3. By the 2 R. S. p. 17, § 4, Common Pleas Courts have exclusive jurisdiction in suits against executors, &c. But there is no statute by which the right of executors, &c., to sue in the justice's Court is taken away. That right, with limitations as to amounts, existed before the enactment quoted. The justices' act appears to confer jurisdiction within a given amount, without reference to the character in which a party sues.—*Arnold et al. v. Fleming*, 11.
4. Suit may be brought before a justice of the peace, in the county where the cause of action arose, against a resident of another county found within the justice's jurisdiction.—*Matlock v. Powell*, 378.
5. The Court of Common Pleas of a county, has original and exclusive jurisdiction in all



matters relating to the probate of last wills and testaments, which are properly admitted to probate in that county; to the granting of letters testamentary, of administration, and of guardianship, where such letters are properly to be granted in that county; to the settlement and distribution of decedents' estates and the personal estates of minors, where such settlement and distribution are properly to be made in that county; of all actions against executors and administrators appointed in that county; and to authorize guardians to sell and convey real estate of their wards, where such guardians are appointed in that county, whether the real estate lay in that or in another county.—*Ex parte, Shockley*, 413.

6. Section 5 of the act organizing the Court of Common Pleas, giving that Court concurrent jurisdiction with the Circuit Court in all actions against heirs, devisees, &c., is not repealed or limited by the exception in § 11 of the same act, nor by § 5 of the act organizing the Circuit Court.—*Fleming et al. v. Potter et al.*, 486.

7. An exception to an authority granted by one section of a statute, cannot be held to qualify another and a different authority granted by another section in unqualified terms—*Ibid.*

8. Thus the Common Pleas has jurisdiction in actions against heirs, &c., though the title to real estate be in issue, and the amount in controversy be more than 1,000 dollars.—*Ibid.*

See APPEAL, 7; COURT OF COMMON PLEAS, 3; LIEN, 2; NUISANCE, 4; STATE PRISON, 2.

## JURY.

1. The discharge of a jury in possession of a criminal cause upon a valid indictment, not called for by imperious necessity, and without the consent of the defendant, operates as an acquittal, and bars another trial; but, as a general rule, such discharge, with the consent of the defendant, is not a bar.—*McCorkle v. The State*, 39.

2. Such discharge, in the court-house, in the presence of the officers of the Court, the defendant, and his counsel, entered of record by the defendant's consent, in pursuance of the consent of the Court previously given in session, is not a bar, though the judge be absent at the time; and the record of the discharge, and of the manner of it, cannot be contradicted on a subsequent trial.—*Ibid.*

3. PERKINS, J.—The consent of the Court to the discharge, is not necessary.—*Ibid.*

4. If misconduct of the jury, in suffering outside rumor to influence their verdict, be assigned as error, it must appear that the rumor was known to the jury at the time their verdict was agreed upon.—*Rowland v. The State*, 575.

5. It is error to permit the jury trying a criminal cause, to disperse among the people during an adjournment pending the trial, without the consent and over the objection of the defendant.—*Quinn v. The State*, 589.

See ADMISSIONS; BASTARDY, 1, 2, 3; CHANCERY, 6, 7, 8; CRIMINAL LAW, 18; EVIDENCE, 18; NUISANCE, 6; VERDICT.

## JUSTICE OF THE PEACE.

*Constable may purchase Judgment of.*] See CONSTITUTIONAL LAW, 10.

See APPEAL, 3, 7, 8; JURISDICTION, 3, 4; LIEN, 2.

## L.

## LANDLORD AND TENANT.

1. If A. lease a house and lot to B., and B. assign the lease to C., who occupies the premises, and C. dig a hole, by which, after the expiration of his lease, and after the lessor has

resumed the possession, the cellar of *D.*, an adjoining tenant of *A.*, is flooded with water: *Quære*, whether *A.* can fill up the hole and pay *D.* the damage sustained by means of it, and sue *C.* for the amount expended.—*Dipple v. Douglas*, 535.

2. It is error to refuse to instruct the jury, in such case, that if they find from the evidence that *D.*'s cellar would have been flooded if the hole had not been there, they cannot make the damage to him a part of their verdict.—*Ibid.*

See LEASE.

### LARCENY.

By our statute, larceny consists in the feloniously stealing and taking away the personal goods of another. The general doctrine is, that the felonious quality consists in an intent to defraud the owner for the use and benefit of the thief; but there may be larceny without anticipated benefit to the thief. The felonious intent must exist at the time of the taking.—*Keely v. The State*, 36.

See CRIMINAL LAW, 4, 42, 43; INDICTMENT, 2.

### LEGACY.

See HUSBAND AND WIFE, 2, 4. WILL.

### LEASE.

The transfer of a lease by assignment may be by a separate instrument, and such instrument, being a transfer of an interest in land, may be properly recorded; but it will not operate as constructive notice to a subsequent purchaser, if it fail to describe the premises, and define the term, or to contain language of description by which the original lease can be recognized as the thing transferred.—*Martindale et al. v. Price*, 115.

See LANDLORD AND TENANT.

### LEVEES AND DRAINS.

See CORPORATIONS, 6, 7; TAXES, 3 to 6.

### LICENSE.

*To sell Liquor.*]

See APPEAL, 1, 2.

### LIEN.

1. Action to recover money and enforce a vendor's lien. The complaint did not allege that the defendants were insolvent, nor that there was no personal property, nor any equivalent averment. The only question is, whether a judgment, declaring the lien and for the sale of the land, should have been rendered in the absence of such averments. *Held*, on the authority of *Scott v. Crawford*, 12 Ind. R. 411, that the judgment for the money, and declaring it a lien, is right; but the order directing the sale of the specific property, in the first instance, is wrong.—*Bowen et al. v. Fisher*, 104.
2. A suit to enforce a lien upon real estate, is in the nature of a suit to foreclose a mortgage, and is not embraced by § 10, 2 R. S. p. 451, conferring civil jurisdiction upon justices of the peace.—*Ainsworth v. Atkinson et al.*, 538.

See MARITIME LIENS; MECHANICS' LIENS; MORTGAGE, 4; TAXES, 10 to 13.

LIMITATIONS.

1. Where a person claims the benefit of an exception in the statute of limitation, he must show that he comes within it.—*Vail et al. v. Halton et al.*, 344.
2. *Vancleave v. Milliken*, 13 Ind. R. 105, followed—*Ibid.*
3. A prosecution for knowingly receiving stolen goods, must be commenced within two years from such reception.—*Jones v. The State*, 346.
4. A statute of limitation cannot be relied upon, unless it has been pleaded.—*Bowman v. Mallory*, 424.

See ADVERSE POSSESSION, 1, 3; CRIMINAL LAW, 9, 10, 13; EXECUTORS AND ADMINISTRATORS, 6; HUSBAND AND WIFE, 8; SET-OFF, 2.

LIQUOR LAW.

1. The offense of selling liquor to a minor is, the sale to the minor, not believing or having reason to believe him to be an adult.—*The State v. Kalb*, 403.
2. A person prosecuted for the offense, may show that the person sold to was a stranger to him, and that his personal appearance would lead a person of common observation to believe him an adult, and that he represented himself as such; or if he knew the person, but not his age, he may show that he is treated by his parents, his friends, and the community, as an adult.—*Ibid.*

See APPEAL, 1, 2; CONSTITUTIONAL LAW, 8.

LIS PENDENS.

*May be referred.]*  
*Joinder of.]*

See ARBITRATION AND AWARD, 6.  
See PLEADING, 40.

LOAN.

See BILLS OF EXCHANGE, 1; CORPORATIONS, 3.

LOST WRITING.

See PLEADING, 23; PROMISSORY NOTES, 12, 13.

M.

MALICIOUS TRESPASS.

A malicious trespass is punishable as a criminal offense, and not by civil damages. *Butler et al. v. Mercer*, 479.

MALPRACTICE OF A PHYSICIAN.

1. At common law, a suit against a physician for malpractice, sounding in tort, did not survive to the representative of the person injured. The right of action died with the person.—*Long v. Morrison*, 595.
2. A husband had two actions against a physician for malpractice in treating his wife; the first for the loss of service, &c., the second, by husband and wife for the personal injury.—*Ibid.*
3. Where such malpractice results in death, an action lies for damages for the loss of service from its commission to its result; and if the right of action grow out of a breach of the

contract for skillful treatment on the part of the physician, it is a chose in action, and survives the death of the wife.—*Ibid.*

4. As at common law, so by the code, husband and wife must join in a suit for an injury to the person of the wife, by malpractice of a physician, and the husband could, at common law, release the action; but as the wife, if living, could not maintain a separate action for the tort, so her administrator must join her husband in such suit; and under the statute the husband cannot settle the suit nor control its proceeds, independent of the administrator. But the non-joinder of the husband is not ground for a reversal, where no objection was made below.—*Ibid.*
5. A physician is liable for damages arising as well from the want of skill as from neglect in the application of skill.—*Ibid.*
6. On the question of damages in such cases, the common-law rule must prevail. Where the action is by husband, master, or parent, for individual loss occasioned by a tortious act towards wife, infant, or servant, the suffering of the immediate subject of the wrongful act cannot be taken into account in assessing the damages.—*Ibid.*

#### MANDAMUS.

In this case, there was no demurrer to the complaint setting forth the facts upon which a mandamus was prayed. The ruling upon a motion to quash the alternative writ was not excepted to. *Held*, that the question whether the party had another remedy was not presented.—*The Jeffersonville Railroad Co. v. Ferry et al.*, 11.

*Return of Alternative Writ.*] See CLAIMS AGAINST THE STATE, 3.

See COUNTY BOUNDARIES; OFFICE, &c., 6.

#### MARITIME LEINS.

1. The water-craft law of *Indiana*, providing for the enforcement of leins on vessels, does not extend to contracts made and broken out of this state, and consequently an attachment suit will not lie for a breach of such a contract.—*Coplinger v. The Steamboat David Gibson*, 480.
2. An action *in rem* would not lie at common law.—*Ibid.*
3. The law of a foreign state, where such a contract was made or broken, will not be enforced in a suit upon the contract in this state, unless the law be pleaded and proved, and even then, no further than our system of practice will enable the Courts to enforce it.—*Ibid.*
4. A suit *in personam*, as at common law, would lie, and the action would be transitory; but to maintain it, jurisdiction of the person would have to be acquired, either by service of process or voluntary appearance.—*Ibid.*
5. The filing of an attachment-bond, and taking depositions on behalf a vessel, do not constitute a voluntary appearance to the suit, as one *in personam*.—*Ibid.*
6. *Semble* that the plaintiff in an attachment suit under the statute, might move for leave to amend his complaint, and to have process against the person, so as to change his proceeding to a common-law action.—*Ibid.*

#### MARRIAGE, CERTIFICATE OF.

1. Section 54, 2 R. S. p. 441, repeals that portion of § 11, 1 R. S. 362, fixing the penalty for failure to return a marriage certificate. An information lies upon the former statute, and

it is not necessary to allege that one month has elapsed after the time within which the return should have been made.—*The State v. Horsey*, 185.

2. The information in this case, charging that the defendant, a justice of the peace of, &c., at, &c., solemnized a marriage between, &c., and failed to return and file in the clerk's office a certificate of the marriage, with the license therefor, within three months, &c., contrary, &c., is good.—*The State v. Pierce*, 392.
3. Section 54, 2 R. S. p. 441, by implication, repeals § 11 of the act regulating marriages, if the latter section would otherwise have any force.—*Ibid.*

### MAYOR.

*Jurisdiction of.*]

See OFFICE, &c., 5.

### MECHANICS' LIENS.

1. Suit to enforce a mechanic's lien, &c. The complaint contained two paragraphs—1. That plaintiff furnished the materials to a contractor; that the proprietor was owing the contractor, and that notice of lien was filed, &c. 2. An original promise to pay for the materials in consideration they should be furnished to the contractor. Trial on the general denial. The evidence is not of record. There was a general judgment for the value of the materials simply, but not ordered to be specifically enforced. *Held*, that this judgment might be right on the second paragraph.—*McDaniel v. Weaver*, 517.
2. In a suit to enforce a mechanic's lien, an answer alleging that the property is now owned by a third person, but not denying the ownership of the defendant at the time the lien attached, is bad.—*Ainsworth v. Atkinson et al.*, 538.

### MISJOINDER.

*Of Counts.*]

See INDICTMENT, 2.

See JOINDER OF CAUSES OF ACTION.

### MISTAKE.

*In Deed.*]

See JOINDER OF CAUSES OF ACTION.

### MORTGAGE.

1. A chattel mortgage is good as between the parties, though not recorded within ten days from its execution.—*McTaggart et al. v. Rose*, 230.
2. An agreement to pay usurious interest on notes secured by mortgage, is void, and no bar to a suit to foreclose.—*Beauchamp v. Leagan*, 401.
3. Mortgaged premises may be ordered to be sold in such parcels as they may be found divisible into.—*Ibid.*
4. By taking a mortgage to secure unpaid purchase-money, the vendor of real estate waives the implied equitable lien which he might otherwise have had for the payment thereof, and creates an express lien.—*Harris v. Harlan*, 439.
5. As to the question of priority between the holders of notes for installments of purchase-money secured by mortgage, *Hough v. Osborne*, 7 Ind. R. 140, is followed.—*Ibid.*
6. The holder of the junior of two such notes need not be made a party to an action by the holder of the senior note to foreclose, notwithstanding the statute requiring that all persons having an interest in the subject of the action shall be made parties.—*Ibid.*

7. The record of a mortgage is, by statute, original evidence of the contents of the instrument.—*Lyon et al. v. Perry et al.*, 515.
  8. If the complaint against a mortgagor and a purchaser from him, for foreclosure, fail to allege that the mortgage was recorded and that the purchaser had notice, the proof of these facts without objection cures the defect.—*Ibid.*
  9. An outstanding mortgage, where there has been no ouster of the purchaser holding under a deed, is no bar to a suit for purchase-money.—*Mitchell et al. v. Dibble et al.*, 526.
  10. Suit to foreclose a mortgage. Answer, that the land was conveyed for a consideration by the mortgagee to the mortgagor, and mortgaged to secure the payment of the consideration; and averring that the mortgagee had no title. *It seems*, that the answer was bad, so far as a judgment of foreclosure was concerned.—*Hubbard et ux. v. Chappel*, 601.
- See JUDGMENT, 2; LIEN, 2; PARTIES, 3; PERSONAL PROPERTY, 2, 3; PLEADING, 26.

## N.

## NEW TRIAL.

1. An application for a new trial, in order to obtain evidence, based upon the fact that the witness was a railroad hand, and the party did not know where to send for him or his deposition, for the trial had, is within the case of *Gibson v. The State*, 9 Ind. R. 264.—*Keely v. The State*, 36.
2. No affidavit is necessary to the proper determination of a motion for a new trial based upon excessive damages, insufficiency of evidence, and verdict contrary to law.—*Harris v. Rupel*, 209.
3. Time will not be given to enable a party to prepare affidavits to support his reasons for a new trial, unless in addition to a good excuse for their non-production, it be made to appear of record that it is in the power of the party to procure sufficient affidavits.—*Ibid.*
4. Where a motion for a new trial had been overruled for the want of affidavits sustaining the reasons upon which it was based, and a second motion was made and the necessary affidavits presented, the latter motion was held to have been properly overruled, because no excuse was shown for the non-production of the affidavits upon the first motion.—*Ibid.*
5. Where one of the reasons upon which a motion for a new trial was based, was newly discovered evidence, the nature of which was set out in proper affidavits, and counter-affidavits were filed, directly contradictory of those affidavits, it was held that a question was presented for the Court, the decision of which the Supreme Court could not disturb.—*Ibid.*
6. In a suit by a husband for the seduction of his wife, the affidavit of a physician disclosing communications made to him, as such, by the wife, to the effect that she had had an abortion, from having had illicit intercourse with a certain person during the absence of her husband, will not sustain a motion for a new trial, based upon the discovery of such evidence, unless it be also shown that the wife would consent to such disclosure upon the trial.—*Ibid.*
7. Affidavits evidently false, or contradictory, upon their face, of the evidence upon the former trial, will not sustain a motion for a new trial upon this ground.—*Ibid.*
8. Nor will the affidavit of the defendant that he can prove by *A. B.* and by *D.*—christian name not known—that they had had sexual intercourse with the wife, of which the plaintiff was cognizant, sustain a motion for a new trial on account of the discovery of such evidence, unless it be shown by the affidavit of the proposed witnesses that they would so testify.—*Ibid.*
9. Where no proper exception is taken in a cause, a motion for a new trial reaches nothing but the merits as shown by the evidence.—*The State ex rel. May v. Rabourn et al.*, 300.

10. One of the reasons for a new trial was as follows: "Because of error of law occurring at the trial, and excepted to by the defendant at the time." *Held*, too vague.—*Barnard v. Graham*, 322; *Medler v. Hiatt*, 405.
11. Where several charges are given to the jury, a party asking a new trial on the ground of error in the instructions, must point out with reasonable certainty the error complained of.—*Robinson v. Hadley*, 417.
12. This Court will not reverse the ruling of the Court below, refusing to grant a new trial moved for on the ground that the verdict is not sustained by the evidence, unless the verdict appears most clearly erroneous.—*O'Herrin v. The State*, 420.
13. It appears that *A.* and *B.* were engaged together in buying and shipping wheat for others. *A.* settled with those for whom the purchases were made, and, for a certain part of the wheat, was compelled to deduct a specific sum per bushel from the usual price, because the same was damaged. *A.* then sued *B.* for money had and received, money laid out and expended—the principal items of the claim being the one-half the loss on the damaged wheat, and the one-half the commission for buying, &c. There was no evidence of the amount paid for the damaged wheat, nor of the amount obtained therefor, nor of the state of the account between the partners, nor of any demand for a settlement or payment of any balance claimed to be due, if such demand was necessary. *Held*, that a new trial should have been granted.—*Spicely v. True*, 437.
14. Where the record does not contain the evidence given on the trial, this Court will not hold the refusal of a new trial on account of newly discovered evidence to be error; for it cannot be known how far such newly discovered evidence was merely cumulative.—*O'Brian v. The State ex rel. Swift*, 469.

See CHANCERY, 7; PRACTICE, 6, 17, 25.

#### NON-RESIDENT.

See INTERROGATORIES, 3.

#### NOTARY PUBLIC.

Certificate of.]

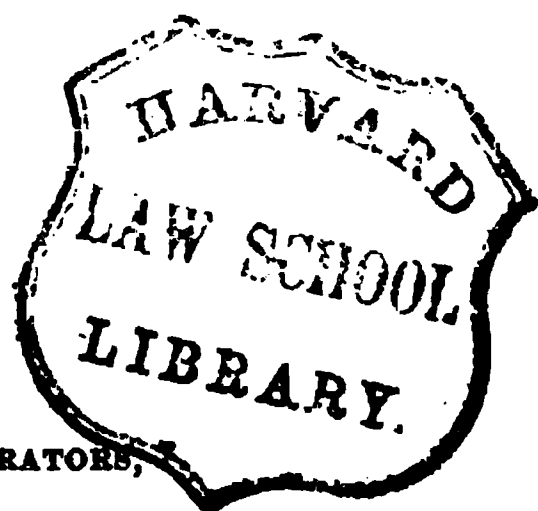
See EVIDENCE, 3.

#### NOTICE.

Of Claim against Estate.[ See EXECUTORS AND ADMINISTRATORS,

Of Assignment.] See PROMISSORY NOTES, 1.

Of Call for Stock.] See RAILROAD COMPANY, 3, 4.



#### NUISANCE.

1. Information charging that "on the first of March, 1857, at, &c., *Michael Baugh* erected, and continually from thence hitherto, continued, maintained, and kept," &c. It was insisted that the Court erred in permitting any evidence of the existence of the nuisance, except on the said first day of March. *Held*, that this was frivolous. The information, to the common understanding, plainly enough charges a continuous nuisance. The word "has" may be supplied, if it will make the pleading more certain.—*Baugh v. The State*, 29.
2. It does not follow as a consequence of the recovery of damages for a nuisance, that the nuisance shall be abated.—*Cromwell et al., v. Lowe*, 234.
3. And where the suit was for damages, with a prayer for abatement, it seems that a verdict

for damages, with special answers to interrogatories never propounded, intended as a basis for an order for the abatement, was not invalid on account of such special findings; but would support a judgment for damages, and the specific relief prayed.—*Ibid.*

4. Where the plaintiff averred title in the premises injured by an alleged nuisance, and the defendant answered by a denial, and the plaintiff offered his title deeds in proof of the issue, it was held that the Common Pleas was ousted of jurisdiction.—*Ibid.*
5. Prosecution for a nuisance in keeping a disorderly house wherein intoxicating liquors were sold, "by then and there, at divers times, permitting dissolute persons to drink, tittle, carouse, and swear, to the annoyance," &c. *Held*, that evidence of "shooting, yelling, and laughing," was admissible to sustain the charge.—*Garrison v. The State*, 287.
6. The jury, in cases of nuisance, may look to the evidence of acts done, and the probable consequence of them, rather than to testimony of particular witnesses as to the effect such acts had upon them.—*Ibid.*

### NUNC PRO TUNC.

See PRACTICE, 13.

O.

### OATHS.

See FOREIGN COMMISSIONERS.

### OCCUPATION.

See USE AND OCCUPATION.

### OFFICE—OFFICERS—OFFICIAL BONDS.

1. The Clerk of the Circuit Court is merely a ministerial officer, and in respect to the approval of official bonds, he has no discretion except to determine whether the security offered is sufficient.—*Gulick v. New*, 93.
2. The governor may determine, even against the decision of a board of canvassers, whether an applicant is entitled to receive a commission or not, where the objection to his right to receive it rests upon the ground that a constitutional prohibition is interposed.—*Ibid.*
3. If the governor should ascertain that he has commissioned a person who is ineligible to the office, he may issue another commission to the person legally entitled thereto.—*Ibid.*
4. Where a majority of the ballots at an election were for a person not eligible to the office under the constitution, it was *held* that the ballots cast for such ineligible person were ineffectual, and that the person receiving the greatest number of legal votes, though not a majority of the ballots, was duly elected, and entitled to the office.—*Ibid.*
5. The mayor of a city, under the general law, has jurisdiction as a judicial officer throughout the county; and the voters of the county are, therefore, chargeable with notice of his ineligibility, under the constitution, to any office other than a judicial one, during the term for which he was elected.—*Ibid.*
6. A writ of mandate is the proper remedy against a clerk for refusing to approve an official bond.—*Ibid.*
7. The offices of township trustee and supervisor are lucrative, within the meaning of § 9, art. 2 of the constitution.—*Creighton et al. ex rel. Farras v. Piper*, 182.
8. In a suit which concerns the public, the title to an office—the officer being in the exercise



of his duties—cannot be questioned collaterally, even when the officer is a party to the record.—*Ibid.*

9. The act of 1859, touching the salaries of officers, does not provide a salary for district attorneys.—*Dodd v. Sweetser*, 292.
10. The offices of prosecuting attorney and district attorney are distinct, notwithstanding the names may have been used interchangeably in some statutes. The one was created by the constitution, the other is a creature of the statute.—*Ibid.*

### ORDER OF TRYING CAUSES.

See PRACTICE, 15.

### P.

### PARTIES.

1. *A.* having recovered a judgment against *B.* upon which an execution was issued and returned *nulla bona*, filed an affidavit stating the recovery of the judgment and the issuing and return of the execution, and that *C.* was indebted to *A.* 155 dollars on note and mortgage. *C.* was summoned to answer, but *B.* was not made a party. Held, that this was error.—*Wall v. Whisler*, 228.
2. In an action for damages for an injury done by trespassing animals belonging to several persons, the plaintiff may elect to sue all or only a part of the owners.—*Brady et al. v. Ball*, 317.
3. A junior mortgagee, though not a necessary, is a proper party to a proceeding by a senior to foreclose.—*Meredith et al. v. Lackey*, 529.

See JUDGMENT, 5, 6; MALPRACTICE OF A PHYSICIAN, 4; MORTGAGE, 6; PARTNERSHIP, 2; PLEADING, 26; PROMISSORY NOTES, 5, 8.

### PARTNERSHIP.

1. If a firm pays for land, and the conveyance is to one of the partners, there is a resulting trust in favor of the firm.—*Indiana Pottery Co. v. Bates et al.*, 8.
2. And in a suit by one claiming title under the firm for a conveyance of the land, the heirs of the trustee are proper defendants; and they cannot object that the surviving partners and the heirs of those deceased are made co-defendants.—*Ibid.*

See BILLS OF EXCHANGE, 2.

### PATENT.

*Of Land from the U. S.]* See ADVERSE POSSESSION, 3; TAX-TITLE.

### PAYMENT.

See EXECUTORS AND ADMINISTRATORS, 1, 2, 3.

### PENITENTIARY.

See STATE PRISON.

### PERSONAL PROPERTY.

1. Personal property may be conveyed even without a writing, if possession accompany the conveyance.—*McTaggart et al. v. Rose*, 230.

2. The fact that the owner is indebted, or even insolvent, at the time of the conveyance, will not of itself invalidate the title, if no liens have attached.—*Ibid.*
3. So where possession was taken under a chattel mortgage.—*Ibid.*

See MORTGAGE, 1; REPLEVIN; TAXES, 9, 13.

### PHYSICIANS.

See MALPRACTICE, &c.

### PLEADING.

1. Suit on note. Answer, first, denial; second, that defendant did not execute and deliver said note, &c.; third, want of consideration, setting out facts, &c.; fourth, failure of consideration, setting out the facts relied on, &c. Reply, in effect, denying the third paragraph of the answer. No notice taken of any other. The only evidence given was the note. *Held*, that there was error. The fourth paragraph of the answer, as presented by the record, appears to stand uncontradicted. The facts averred in it, therefore, under the statute, were admitted.—*Stebbens v. Lenfesty*, 4.
2. A pleading denying the execution of a written instrument, is valid without being sworn to.—*McNeer et al. v. Dipboy*, 18.
3. Complaint to foreclose a mortgage, the installments all being due. Answer, that there was a separate agreement in writing that the notes, payable on the face in cash, might be discharged, when due, in bonds of a certain railroad company. Demurrer sustained. *Held*, that the demurrer was rightly sustained for two reasons—1. The written agreement referred to in the answer, or a copy of it, was not filed. 2. The notes were payable in cash, and the written agreement gave a privilege to discharge them in railroad bonds. It will bear that construction as pleaded, and the ambiguity, if one exists, on account of the instrument not being filed or copied, must operate against the pleader.—*Little et al. v. Vance*, 19.
4. An answer purporting to go in bar of the whole cause of action, but setting up facts in bar of a part only, is bad on demurrer.—*Brown v. Perry*, 32.
5. The general denial in the answer, admits the capacity of the plaintiff to sue; and a special answer in a subsequent paragraph, denying his competency, is in the nature of a plea in abatement—a dilatory answer—and is inconsistent with the general denial.—*Jones v. The Cincinnati Type Foundry Co.*, 89.
6. Answers to the jurisdiction, the disability of parties, &c., must precede those to the merits; because each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter.—*Ibid.*
7. Sale of a wagon to be paid for by the delivery, at a certain time, of 500 bushels of corn. Suit for failure to deliver. Answer, the general denial, and delivery according to contract. Judgment for plaintiff for 15 dollars and costs. *Held*, that the judgment for costs was right; and that payment in specific articles could be proved under the issues.—*Hamar v. Dimmick*, 105.
8. In a suit upon a promissory note given for the purchase-money of land, an answer setting up a failure of title, without showing breach of covenant or fraud, is bad on demurrer.—*Laughery v. McLean*, 106.
9. If the plaintiff fail to reply to a paragraph of the answer which would bar a recovery, the defendant has a right to judgment on the pleadings; but if he fail to assert that right in the lower Court by a proper motion, he cannot be allowed to avail himself in the Supreme Court of the facts admitted by the pleadings.—*Martindale et al. v. Price*, 115.
10. Where an affidavit for an attachment averred a fraudulent conveyance, an answer traversing the averment is not demurrable.—*McFarland et al. v. Birdsall et al.*, 126.

11. A complaint not demurred to is good after verdict.—*Vauster v. The Ohio, &c., Railroad Co.*, 174.
12. The general denial admits the capacity of the plaintiff to sue.—*Hardy v. Merriweather*, 203.
13. Suit to foreclose a mortgage. Answer, that the mortgage was given to secure the consideration of the purchase of a mill and machinery, which was represented to be in a good condition, &c., when it was not; but it was not shown but that the defendant had full opportunity of inspecting the property purchased, and judging for himself. *Held*, that the answer was defective in this particular.—*Negley et ux. v. Wilson*, 215.
14. The complaint in this case ought to set aside an entry of satisfaction of a judgment. This was resisted on the ground that the note and mortgage upon which the judgment was rendered, were without consideration. *Held*, that the defense was not responsive to the complaint.—*Bowers et al. v. Bound et al.*, 218.
15. Suit upon a judgment recovered in a foreign state. The complaint was in the usual form, setting out a copy of the record of the judgment; but the record set out contained none of the pleadings in the cause, nor did it in any manner disclose what was the cause of action or the subject in controversy. *Held*, that the complaint was bad on demurrer.—*Ashley v. Laird et al.*, 222.
16. One good paragraph of an answer, in bar of the whole complaint, admitted by demurrer to be true, bars the action. Thus a judgment for the defendant over the general issue untried, may be right.—*Talbott et al. v. Armstrong et al.*, 254.
17. A judgment for the plaintiff over the general issue untried, is error.—*Ibid.*
18. Where the complaint contains one good count, and the verdict is general, the Supreme Court will sustain it.—*Halderman v. Birdsall, et al.*, 304.
19. In an action against an administrator for money paid for the use of the estate of his decedent, the complaint must show that the money was paid at the request, express or implied, of the deceased or the defendant.—*Woodford v. Leavenworth*, 311.
20. If the facts set up in a rejected paragraph of an answer could be given in evidence under a paragraph left standing, the rejection cannot be assigned as error.—*Daily et al. v. Nuttman*, 389.
21. Suit to recover land. The plaintiff relied upon a sheriff's deed. The defendant claimed title as the vendee of the execution-defendant. The sheriff's sale was upon a judgment recovered before a justice, a transcript of which was filed in the office of the clerk of the Common Pleas. The complaint averred that the defendant purchased whilst the writ was in the sheriff's hands, and after levy upon the land. The issue upon which the cause was decided was made upon a paragraph of the answer setting up that the judgment-defendant was not, at the time of the rendition of the judgment, a resident of the county, and did not appear to the action. The finding of the Court sustained the facts stated in this paragraph, and declared the judgment a nullity. *Held*, that the paragraph was bad, and the finding erroneous.—*Easterday v. Joy et al.*, 371.
22. Suit by judgment-creditors to set aside a conveyance. Answer, setting up a former judgment in the Circuit Court of the *United States*, held in the district of *Indiana*, in a suit between the same parties, upon the same cause of action. A transcript of the judgment was filed and made part of the answer. Demurrer overruled. Subsequently other creditors came in, who were not parties to the former suit, and, as an amendment to the bill pending, to which an answer was in, set up their judgments and asked that the conveyance be set aside as to them. Answer to this amendment, setting up the same judgment in bar, and making the copy thereof filed with the first answer a part of the second by reference. Demurrer sus-

tained, and final judgment rendered, setting aside the conveyance as to all the creditors. *Held*, that, in any view of the pleadings, this was error.—*The Cincinnati, Union, &c., Railroad Co. v. Wynne et al.*, 385.

23. In a suit upon a note and mortgage, the defendant pleaded a written release, alleging that the release was lost. Reply in denial, without verification by oath. *Held*, that although the want of a verification might, perhaps, excuse proof of the execution of the release, the reply was still effectual as a traverse of all other material averments in the answer.—*Hill et al. v. Jones*, 389.

24. Suit on a note given by a *feme covert* whilst *sole*. Answer, failure of consideration in this, that the note was given for lands sold by plaintiff to the female defendant; that at the time of the sale, said plaintiff had no title to said lands (describing them), nor has he now, nor has he at any time since had. Reply, denying that the consideration of the note was the land described in the answer. Motion to strike out the reply, because it did not meet the whole answer, or take issue thereon, overruled. *Held*, that it was immaterial whether the plaintiff ever had title to the lands, if they were not the consideration for the note.—*Sears et ux. v. Featheringill*, 402.

25. Where affirmative matter in the reply covers the whole answer, and is sustained by a special verdict, the plaintiff is entitled to judgment.—*Medler v. Hiatt*, 405.

26. Suit on notes and to foreclose a mortgage. Answer, that the mortgage had not been recorded within ninety days, and that afterwards the defendant sold said lands to one *Brown* in good faith and for a valuable consideration, who was in possession and was a necessary party, &c. Demurrer sustained. *Held*: The answer was not sufficient. If it had been sufficient to prevent a foreclosure, it was not a valid defense against a recovery of judgment on the the notes, and would, therefore, be bad, having been pleaded in answer to the whole complaint. But it was not an answer to the prayer for a foreclosure. If *Brown* had any rights, distinct from those of the defendant, they would not be concluded by a proceeding to which he was not a party. He was not, therefore, a necessary party; whether a proper party upon his own application, *quære*.—*Cline v. Inlow*, 419.

27. The record of a judgment falls within the statutory requirement that, where a written instrument is the foundation of an action, either the original or a copy thereof shall be filed with the complaint.—*Reor et al. v. Raney*, 441.

28. Suit on note. Answer, averring that the note was given for lands for which an imperfect deed was executed, which is referred to and made a part of the answer, and that the vendor had no title to a part, &c., of said land, &c. Demurrer sustained. The deed exhibited did not sustain the averments in the answer. *Held*, that the demurrer was properly sustained.—*Wilkerson et al. v. Chadd*, 448.

29. An argumentative denial is good on demurrer.—*French et al. v. Howard*, 455.

30. Where a suit had been brought on the first of two notes for installments of the purchase-money of real estate, and judgment rendered for the plaintiff on issues made upon certain defenses, it was *held*, on demurrer, in a suit upon the second note, that the defendant was estopped to plead the same defenses.—*Ibid*.

31. Suit upon a note for the second installment of purchase-money of real estate. Answer, failure of consideration. Reply, 1. A general denial of the answer; 2. An argumentative denial; 3. An estoppel by former judgment upon the same defense. *Quære*, whether all the matters pleaded specially might have been given in evidence upon the general denial.—*Ibid*.

32. The payee of a bill of exchange, after acceptance, indorsed to *A.* who indorsed to a bank. After protest for non-payment he took up the bill and sued the drawer and acceptor. The

latter answered, 1. A general denial. 2. That the bank charged 12 per cent. for discounting the bill. 3. That the plaintiff, for a consideration, and without the defendant's knowledge, released the drawer.

*Held*, first, that the second paragraph was bad; that it was no concern of the defendants what discount the bank charged *A*.

Second, that the third paragraph was bad for uncertainty; that if the release was in writing, it, or a copy of it, should have been filed—if not, the terms and consideration should have been set out; but *quære*, whether if well pleaded, the paragraph would be a bar.—*Hosier v. Eliason*, 523.

33. If a party demur, and pending his demurrer plead over, the pleading overrules the demurrer; but if both could stand, it would be presumed, upon a general finding, that the issues on both were referred to the Court together.—*Ibid*.

34. If the reply set up, even argumentatively, facts inconsistent with the allegations in the answer, it is sufficient.—*Meredith et al. v. Lackey*, 529.

35. The defendant cannot be compelled to answer a complaint to which a demurrer has been sustained, unless the record made by that ruling be changed.—*Middleton v. Miller*, 537.

36. Complaint in two paragraphs—1. Upon a written contract for plowing and planting 40 acres of prairie land, at 175 dollars, 50 dollars payable in cash when the planting was done, and the balance payable in corn at 15 cents per bushel, from the crop, and if sufficient should not be produced, the deficiency was to be paid in cash. 2. Upon an account for plowing and planting 40 acres of prairie land, at 4 dollars and 50 cents per acre. Affidavit by defendant that there was but one contract, and motion in writing that plaintiff be compelled to elect upon which paragraph he would rely. The motion was overruled. *Held*, that this was not error.—*Wilstach v. Hawkins*, 541.

37. Argumentativeness is no cause of demurrer; but a motion to strike out a paragraph of an answer containing an argumentative denial, as amounting to the general denial, may be sustained.—*Williams v. Port*, 569.

38. A complaint for work and labor stating the kind of service and the time for which compensation is claimed, is sufficient without a bill of particulars, if there be no demurrer and no motion for a new trial.—*Davis et al. v. Jenkins*, 572.

39. The general denial, or a default, admits the character in which the plaintiff sues, where that character is averred in the complaint.—*Hubbard et ux. v. Chappel*, 601.

40. A paragraph of an answer setting up the pendency of another cause which ought to be joined, must state facts showing that the causes are such as may be joined. The general allegation that the causes ought to be joined, or that the notes sued on were made by the same parties on the same day, is not sufficient.—*Parish et al. v. Heikes*, 605.

*In Supreme Court.*]

See APPEAL, 9, 10.

See ACTION, 1; AMENDMENT; ASSAULT AND BATTERY, 1, 2, 8; ATTACHMENT, 1; BANKS AND BANKING, 6, 7; CHANCERY, 1 to 6, 8; CONTINUANCE, 3, 4; CONTRACT, 8; CORPORATIONS, 1, 6, 13; COVENANT, 1; DEMAND; EVIDENCE, 2, 13; EXCEPTIONS, 2; EXECUTORS AND ADMINISTRATORS, 4, 6; INDICTMENT; INFORMATION; INTERROGATORIES, 2; JUDGMENT, 4; LIMITATIONS, 3; MANDAMUS; MECHANICS' LIENS; MORTGAGE, 8, 10; PARTIES; PRACTICE, 1, 3, 25, 27, 29; PROMISSORY NOTES, 7, 8, 9, 11, 12; RAILROAD COMPANY, 14; REPLEVIN; REPRESENTATIONS; SET-OFF; STATUTES; TENDER, 2; TITLE TO REAL ESTATE; VARIANCE, 3; VENDOR AND PURCHASER, 4.

## POSSESSION.

See ADVERSE POSSESSION.

## PRACTICE.

1. Suit on a note. The parties appeared, but no answer was filed. A jury was waived, and the matters submitted to the Court. It is insisted that there was a trial without an issue, and, therefore, error. *Held*, that the failure to answer was, for certain purposes, an acknowledgment or confession of the complaint, and if it was necessary to hear proof to enable the Court to render a judgment, this was not, strictly speaking, a trial without an issue, under our code of procedure.—*Scott et al. v. Dibble et al.*, 17.
2. The proceedings of Courts are to be considered *in fieri*, until the close of the term at which they are entered.—*Layman v. Graybill*, 166.
3. Thus where there was no answer as to a part of the claim in suit, and an interlocutory judgment was taken as to that part, and afterwards, upon the return of a verdict, the defendant moved to set aside the interlocutory judgment, and substitute the amount found by the jury as the amount for which judgment should be rendered, supporting his motion by the affidavit of the jurors that they considered the facts of the case and agreed upon their verdict as if the whole amount of the plaintiff's claim was before them; that they did not intend that the sum included in their verdict should be added to the amount of the interlocutory judgment. *Held*, that the Court might, upon this affidavit, rectify the irregularity, and sustain the motion.—*Ibid.*
4. A judgment will not be reversed for a refusal to strike out immaterial matter.—*Andrews v. The Ohio, &c., Railroad Co.*, 169.
5. Where a person, other than a judge, performs an act in the progress of a cause, which should be performed by a judge, the record should show his right to act.—*Negley et ux. v. Wilson*, 215.
6. Suit against several for trespass upon the person. Judgment by default against all but two, as to whom there was a continuance. At a subsequent term they appeared, were tried, and a verdict returned against them. No exception taken. A motion for a new trial was overruled. No motion in arrest. It was contended that judgment was erroneously entered upon the verdict, because of the previous judgment against the co-defendants. *Held*, that under the former practice the objection might have been available; but as it was not raised below, and was not ground for a new trial, it cannot be raised in this Court. *Quære*, whether it could have been made in the Court below.—*Johnson et al. v. Vutrick*, 216.
7. The contrary not appearing by the record, it will be presumed that the Court trying the cause was regularly held, and the cause properly brought to trial.—*Hanes v. Worthington*, 320.
8. Where the Court adjourns for the day, till the next morning, with a notice that it will appear in the Court house, in the intermediate time, on the ringing of the bell, to receive the verdict of a jury who may be out, and does so appear and receive it, the proceeding is regular.—*Davis v. The State*, 358.
9. By the code, notice of the decision of a cause in the Supreme Court is immediately sent to the Court below; and, if no petition for rehearing prevent, at the expiration of sixty days thereafter, a copy of the decision is transmitted, accompanied by such instructions as the Supreme Court may give. If a new trial is ordered, it must take place as soon as the Court and parties are ready for it. The parties must be taken to be ready, unless they (or one of them) show legal cause for delay. The code is silent on the question of time of trial, further than that the cause must be remanded for further proceedings.—*Williams v. Jones et al.*, 363.
10. The Court should not change its record without giving a hearing to the party resisting change, where a hearing is asked.—*Kyle v. Hayward et al.*, 367.
11. When the Supreme Court have affirmed a judgment upon a defective record, the record

cannot be perfected, and another appeal from the same judgment brought before the Court.—*Devoss v. Jay et al.*, 400.

12. The waiver of a jury and the submission of a cause to the summary decision of the Court, embrace a reference of the issues both of law and fact, and the finding of the Court involves the decision of both.—*The Indianapolis, &c., Railroad Co. v. McMahan*, 422.

13. The defendant was tried upon an indictment for larceny. On the return of the verdict, it was discovered that the entry of the return of the indictment by the grand jury, at a previous term of the Court, had been omitted; and thereupon the prosecuting attorney moved that the entry be made *nunc pro tunc*. The defendant admitted the fact that the indictment had been thus irregularly returned, but objected to the *nunc pro tunc* entry, and moved on his part for a new trial, on account of the alleged defect in the record. *Held*, that the Court should have sustained the motion for the *nunc pro tunc* entry. Of its own motion, it should have ordered it on the facts. This Court, of its own motion, would order a *certiorari* to bring up such an entry to affirm a judgment. But there was no final judgment in the case when the appeal was taken, and it must be dismissed.—*The State v. Pearce*, 426.

14. Where the ground of objection to testimony is not stated, the presumption, on appeal, is in favor of the ruling of the Court.—*Sinclair v. Roush*, 450.

15. The Circuit Court has some discretion as to the order in which causes are tried; and, the contrary not appearing, it will be presumed that where a cause was tried out of its order, good ground existed for the action of the Court.—*French et al. v. Howard*, 455.

16. If the ground of objection to testimony do not appear, the objection will not be noticed on appeal.—*Fleming et al. v. Potter et al.*, 486.

17. Where there was no motion for a new trial on that ground, the refusal of the Court to give instructions is not assignable as error.—*Ibid*.

18. Where the evidence is not in the record on appeal, it will be presumed to have sustained the verdict.—*Ibid*.

19. It cannot be assigned as error that the jury did not find specially touching a given fact, if it do not appear that the Court directed them to do so.—*Ibid*.

20. An affidavit in support of a motion to set aside a default, is no part of the record unless made so by a bill of exceptions.—*Round v. The State ex rel. Riley et al.*, 493.

21. The Supreme Court will not decide whether the reasons for a motion to set aside a default are a part of the record, unless it appear whether the motion was overruled because they were deemed insufficient in law, or not true in fact.—*Ibid*.

22. If such reasons be deemed a part of the record, and held sufficient in law, yet it will be presumed, in favor of the Court below, the contrary not appearing, that they were not shown to be true in fact.—*Ibid*.

23. It was not meant, in the language used in *Spencer v. Russell*, 9 Ind. R. 157, to decide that the grounds of the decision of the Court upon the motion in that case might have been made sufficiently to appear by filing the motion and the reasons for it in writing; but only to decide that if the motion and the grounds of it had been so filed, exception to the overruling of it might have been taken in the same manner as to a ruling on demurrer.—*Ibid*.

24. If the record show an entry to have been made "to the satisfaction of the Court," the Supreme Court will presume, the entry not being before it, that it was properly made.—*Ibid*.

25. Judgment for plaintiff. New trial granted. The defendant asked leave to demur to the reply. *Held*, that this was matter in the discretion of the Court.—*Thornton v. Williams*, 518.

26. In a suit before a justice, a motion to reject the answer was overruled, and judgment ren-



dered for the plaintiff. On appeal to the Circuit Court, the same motion was sustained. On appeal to this Court, the clerk copied the answer into the record, as a part of the justice's transcript; but there was no bill of exceptions embodying it. *Held*, that it was no part of the record.—*Greer v. Studabaker*, 519.

27. Where an issue is made and tried, the Court grants any relief consistent with the case made by the complaint and embraced within the issue, without regard to the prayer for relief.—*Hunter v. McCoy*, 528.

28. The failure to grant a request not heard by the Court, is not error.—*Meredith et al. v. Lackey*, 529.

29. *It seems*, that the amount of the judgment may be varied from the amount of the verdict, because of any admission in the pleadings, on motion.—*Ibid*.

See ACTION, 2; AMENDMENT; APPEAL; APPEARANCE; ASSAULT AND BATTERY, 1; BILL OF EXCEPTIONS; CHANCERY; CONTINUANCE; COSTS; COUNTY BOUNDARIES; COURT OF COMMON PLEAS, 3; COURT OF CONCILIATION; CRIMINAL LAW, 1, 2, 3, 5, 6, 7, 18, 19, 21 to 29, 40, 41, 42, 44; DAMAGES; ERROR; EVIDENCE, 1, 6, 7, 8, 18; EXCEPTIONS; EXECUTORS AND ADMINISTRATORS, 7; HUSBAND AND WIFE, 6; INSTRUCTIONS TO THE JURY; INTERROGATORIES, 2, 3; JUDGMENT BY CONFESSION; JUDGMENT BY DEFAULT; JURISDICTION; JURY; MARITIME LIENS; NEW TRIAL; PLEADING, 7, 9, 20, 25, 37; REPLEVIN BAIL; SURETYSHIP; TENDER; VARIANCE; VENUE; VERDICT; WITNESS.

### PRINCIPAL AND SUBETY.

See SURETYSHIP.

### PRISONERS.

See STATE PRISON.

### PROBATE COURT.

*Issue of Fact in.*]

See CHANCERY, 6, 7, 8.

### PROCESS.

See JUDGMENT BY DEFAULT, 1.

### PROMISSORY NOTES.

1. If in a suit by the assignee of a promissory note, the consideration for a part of which the note was executed, was an agreement to convey a valid and clear title to land, which was not complied with, there is a failure of consideration, to the extent that the defendant has paid to perfect his title; and hence the amount may be set up in defense, without regard to any question of notice of the time of assignment.—*Holman v. Creagniles*, 177.

2. A promissory note given for a conditional subscription of stock, is a waiver of the condition.—*O'Donald v. The Evansville, &c., Railroad Co.*, 259.

3. Such a note given some time after the date of the subscription, cannot be viewed as a part of the contract of subscription.—*Ibid*.

4. The taking of collaterals to secure the payment of a promissory note, does not bar a suit up it.—*Mills et al. v. Gould et al.*, 278.

5. Where A. sells property to B., and B., by agreement, executes his notes to C., the latter



- is entitled to sue on the notes; and *B.* will not be allowed to set up the want of interest in the note of *C.* at the time it was executed.—*Stevens v. Songer*, 312.
6. The consideration for the assignment of a note need not necessarily be paid at the time, to render the assignment complete.—*Wolf et al. v. Smith*, 360.
  7. Suit upon a note. Answer, without oath, denying the execution of the note. Demurrer sustained. *Held*, that the answer made a good issue, but did not put the plaintiff upon proof of the execution of the note. The demurrer to it was erroneously sustained.—*Wade v. Mussleman*, 362.
  8. In a suit upon a note by an assignee, he should aver in his complaint the mode in which the assignment in the given case was executed; because, if it was by delivery, he must make the assignor a party; but if it was by indorsement, he need not.—*Barcus et al. v. Evans*, 381.
  9. The makers of a promissory note to an infant cannot plead the infancy of the payee, in a suit against them by his indorsee.—*Frazier et al. v. Massey*, 382.
  10. Suit by the assignee upon notes. Answer, want and failure of consideration, and fraud. Reply, estoppel *in pais* in this, that plaintiff took the assignment of the notes for a consideration paid, and upon a representation of defendant, made during the negotiation therefor, that the notes were valid. It did not appear that plaintiff purchased them on the faith of the representation. It did appear that they were given upon an executory consideration, and that the services had not been performed at the time of the assignment, which plaintiff knew; and that he also knew the notes were obtained by fraud. *Held*, that the estoppel was not established.—*Black v. Mitchell*, 397.
  11. In a suit by the assignee of a promissory note against the maker, an answer averring that the assignor is the real party in interest, without setting up facts to show such to be the case, is bad on demurrer; and interrogatories based upon such an answer will be struck out.—*Lung et al. v. Sims et al.*, 467.
  12. A complaint on a promissory note averring the loss of the note, with an affidavit of its loss and contents, is sufficient without a copy of the note.—*Cleveland v. Roberts*, 511.
  13. Where the trial, in such case, was by the Court, *held* that the affidavit was *prima facie* sufficient evidence of the loss of the note; and that, with the testimony of a witness to the contents, would support a finding for the plaintiff.—*Ibid.*

See BILLS OF EXCHANGE; CORPORATIONS, 10, 11, 12; DELAY OF PAYMENT; MORTGAGE, 5, 6; PLEADING, 1, 8, 28, 30, 31; RAILROAD COMPANY, 11, 13; SET-OFF, 3; VALUATION AND APPRAISEMENT; VARIANCE, 1, 3; WAGER.

#### PURCHASE-MONEY.

See VENDOR AND PURCHASER, 1 to 4, 6 to 11.

#### R.

#### RAILROAD COMPANY.

1. The simple killing of an animal by the cars of a railroad company, is not *prima facie* evidence of negligence on the part of their employes.—*The Indianapolis, &c., Railroad Co. v. Means*, 30.
2. A party cannot have the benefit of the statute of 1853, making railroad companies liable for animals killed without negligence, unless he prove that the road was not fenced as prescribed by the statute.—*Ibid.*

3. Publication of notice of calls for installments of stock may be proved by the affidavit of the book-keeper in the employ of the publisher of the newspaper in which it was made.—*Andrews v. The Ohio, &c., Railroad Co.*, 169.
4. Such notice is sufficient if published once, sixty days before the time fixed for payment.—*Ibid.*
5. False representations of an agent of a railroad company soliciting stock, that the persons undertaking to construct and equip the road were able to complete it without any advance from the company out of their own resources, are no defense in an action upon a subscription.—*Ibid.*
6. The testimony of a witness that, from his knowledge of the country, a railroad could have been built cheaper upon one route than another, is too vague to influence a jury.—*Ibid.*
7. In a suit upon a subscription of stock, the circumstances connected with the payments, and the amount called for, and the amount paid, are proper evidence as to the application of, or intention to apply, the money paid; and the attorney of the defendant may be compelled to testify as to the contents of receipts in his possession, or the defendant may be compelled to produce them.—*Ibid.*
8. *The New Albany, &c., Railroad Co. v. McCormick*, 10 Ind. R. 499, followed.—*Vaxter v. The Ohio, &c., Railroad Co.*, 174.
9. If a subscription of stock in a railroad company is conditioned that the road be located on a certain route, the plaintiff may prove, in a suit upon it, that the defendant owned land upon that route.—*Ibid.*
10. The representations of a soliciting agent with regard to the ultimate value of railroad stock, is mere matter of opinion, upon which the subscriber has no right to rely.—*Ibid.*
11. A railroad company have power to take notes originating in a transaction, or to secure an indebtedness, within the scope of their corporate undertaking; and as a general proposition, a corporation has power to assign a note that it has power to take.—*Hardy v. Merriweather*, 203.
12. The abandonment of the construction of a railroad, does not, of itself, constitute a defense to a suit to recover debts due the company: whilst the corporate organization remains, they may collect dues in their corporate name, for the payment of debts.—*Ibid.*
13. Representations that the company have stock enough to complete the road, and would do it in two years, are too vague to constitute a defense to a suit on notes given for an installment of a subscription.—*Ibid.*
14. An answer, in such a suit, denying that the company has given the defendant his stock, is bad—they are at most only bound to conditionally tender it.—*Ibid.*
15. The statute of 1853, in relation to the liability of railroad companies whose roads are not fenced, for killing stock, does not apply to actions commenced in Courts of Common Pleas and Circuit Courts.—*The Toledo, &c., Railroad Co. v. Hibbert*, 509.

See EVIDENCE, 18.

#### RECEIPT.

A receipt for money is *prima facie* evidence of its contents.—*Chandler v. Schoonover*, 324.  
See *Dale v. Evans et al.*, 288.

See EVIDENCE, 9; SHERIFF, 2.

#### RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 30, 32, 37; INDICTMENT, 2; LIMITATIONS, 3.

RECOGNIZANCE.

See REPLEVIN BAIL.

RECORD ON APPEAL.

See BILL OF EXCEPTIONS, 1, 4; ERROR; INSTRUCTIONS TO THE JURY, 2, 3; NEW TRIAL, 14; PRACTICE, 11, 18, 20, 21, 22, 26.

REHEARING.

See APPEAL, 5.

RELEASE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; PLEADING, 23, 32.

RELIEF FROM VALUATION LAW.

See CONSTITUTIONAL LAW, 11.

REMOVAL OF CAUSE TO CIRCUIT COURT OF U. S.

See APPEARANCE, 2.

REPLEVIN.

In a suit to recover possession of personal property, an answer that defendant was and now is entitled to possession of the property, is bad, unless it set out the grounds of the right asserted.—*McTaggart et al. v. Ross*, 230.

REPLEVIN BAIL.

1. Suit upon a recognizance of replevin bail. A transcript of the judgment of the justice, which had been replevied, together with the proceedings prior to, and after the judgment, was filed with the complaint. It appears that the bail was entered *November 9, 1838*. Subsequent to the entry of bail appear upon the transcript these entries: "Execution, the 30th of *April, 1839*.—*J. Yount, J. P.*" "*May the 20th*. Execution returned not satisfied for want of buyers.—*John McWilliams, constable.*" A demurrer was sustained to the complaint, and final judgment rendered for the defendant, because the suit should have been by *scire facias*. *Held*, that the remedy by complaint is substituted by the code; and, as it relates to the remedy alone, it may be pursued.—*Bowman v. Mallory*, 424.
2. The entries above copied from the transcript do not show, *prima facie*, a satisfaction of the judgment, by levy, &c. They are no evidence of the character of the execution issued, and they do not purport that a levy had been made upon property.—*Ibid*.
3. In a suit against replevin bail, it was held, under the old practice, not necessary to show that execution had issued against the principal; nor that judgment against him or his administrator had been revived.—*Ibid*.

REPLY.

See PLEADING, 9, 23, 24, 25, 34.

Demurrer to, upon New Trial.]

See PRACTICE, 25.

## REPRESENTATIONS.

A defense setting up false representations, but not showing who made them, is bad.—*O'Donald v. The Evansville, &c., Railroad Co.*, 259.

See CONTRACT, 2; EVIDENCE, 16; PLEADING, 13; PROMISSORY NOTES, 10; RAILROAD COMPANY, 5, 10, 13.

## RESIDUARY LEGATEES.

See WILL, 1.

## RULES OF COURT.

1. The words, "This was all the evidence given to the Court," do not meet the requirement of the 30th rule.—*Barnard v. Graham*, 322.
2. The 30th rule discussed and adhered to.—*Cookerly v. Mitchell*, 471.

## S.

## SALARY.

*Of Judges.*]

See COURT OF COMMON PLEAS, 2.

*Of Attorneys.*]

See OFFICE, &c., 9.

## SALE.

1. *A.* sold a piece of land to *B.* for 800 dollars, and bought two horses of *C.* for 375 dollars. As part payment for the land *B.* gave his note to *A.* for 375 dollars, payable to *C.*, who accepted it in payment for the horses. It was disputed whether the note was given as part payment for the land, or for the horses, and the latter applied in payment for the land. *C.* afterwards assigned the note to *A.*, who assigned it to the plaintiff. *Held*, that if the note was given for the horses, the sale was complete, the title and risk passing to the purchaser, though at his request the seller kept them some days afterwards and then bought them back.—*Kelley v. Burnell*, 328.
2. Where *A.* sold personal property to *B.* on credit, with the condition that the title was not to pass till final payment, and that *B.* should have the possession and use the property in the meantime, but should not sell it or any part of it; and before final payment *B.* sold a part of the property, and attempted to sell the remainder: *Held*, that *A.* might peaceably take possession of the remainder for his security, the condition of the sale being broken.—*Shireman v. Jackson*, 459.

*Of Land by Guardian.*]

See EVIDENCE, 12.

*Of Land by Administrator.*]

See EXECUTORS AND ADMINISTRATORS, 5; JUDGMENT, 6.

*Upon Foreclosure.*]

See MORTGAGE, 3.

See SCHOOL LANDS.

## SCHOOL LANDS.

Where the inhabitants of a township had received a part of the purchase-money of school lands, and interest for several years on the balance, and expended the money for the purposes contemplated by the grant, and the purchaser had taken possession and made valuable improvements, *held*, that they must be deemed to have acquiesced in the sale, and that

they are estopped to deny its validity.—*The State ex rel. Parish Grove Township v. Stanley*, 409.

SCIRE FACIAS.

See REPLEVIN BAIL.

SEDUCTION.

1. In suits for seduction, verdicts are seldom disturbed on the ground of excessive damages. *Harris v. Rupel*, 209.
2. Where the evidence tends to support the verdict, it will seldom be disturbed on the ground of insufficiency of evidence.—*Ibid*.
3. In a suit for the seduction of the plaintiff's wife, her statements are not competent evidence for the defendant.—*Ibid*.

See NEW TRIAL, 6, 7, 8.

SET-OFF.

1. Except where the code has otherwise provided, mutuality is essential to a set-off.—*Knour et al. v. Dick*, 20.
2. A set-off is good, to the extent of the sum sued for, though a suit upon it would have been barred by the statute of limitations, at the date of the cause of action against which it is pleaded.—*Fox v. Barker*, 309.
3. Suit on a note. Answer, a set-off. Reply, 1. A denial. 2. A settlement at the time the note was given. One item of the set-off was of a date later than the note. *Held*, first, that the date of an item of a set-off is not conclusive, even if it be *prima facie* evidence of the time the item accrued. Second, that under the issues the defendant might prove all the items of his set-off, and the plaintiff would have to show that they were settled in the note; that if they all accrued before the date of the note, the note would be *prima facie* evidence of settlement; *aliter*, as to such as did not so accrue.—*Thornton v. Williams*, 518.

SHERIFF.

1. Upon money paid to a judgment-creditor before an execution issues, or after the execution is issued, but before it is in any manner served, the sheriff is not entitled to commission.—*Miles v. Ohaver*, 206.
2. And where the execution-defendant delivered to the sheriff his receipts, taken for such payments, it was held that they could not be considered as money—that the sheriff had no right to receive them in satisfaction of the execution.—*Ibid*.

*May Keep Property Attached.*]

See ATTACHMENT, 2.

*Not to Interrogate Talesmen.*]

See CRIMINAL LAW, 19.

SPECIAL TERM.

*Indictment at.*]

See CRIMINAL LAW, 7.

STATE PRISON.

1. The convicts in the state prison, other than those sent to *Michigan City* under the act of 1859, cannot, under existing statutes, be worked outside the prison and the adjoining state grounds.—*Helton et al. v. Miller et al.*, 577.

2. If a cause of complaint for working them elsewhere, arise in *Clark* county, the *Floyd* Circuit Court has no jurisdiction in the suit.—*Ibid.*

## STATUTES.

Where the statute of a foreign state is relied upon, it must be set out in the pleadings and proved upon the trial.—*Davis et al. v. Rogers*, 424.

*Of foreign States.]* See EVIDENCE, 10, 11; MARITIME LIENS, 3.

*Titles of.]* See CONSTITUTIONAL LAW, 4 to 10.

See JURISDICTION, 7.

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## STREETS.

See CITIES.

## SUBSCRIPTION OF STOCK.

See CORPORATIONS, 5; PROMISSORY NOTES, 2, 3; RAILROAD COMPANY, 3, 4, 5, 7, 9, 10, 13.



SUBTERRANEAN WATERS.

If the owner of land make an excavation within his own premises, and thereby drain the well or subterranean spring of another, it is *damnum absque injuria*, and no action will lie.—*The New Albany, &c., Railroad Co. v. Peterson*, 112.

SUNDAY LAW.

Gaming is not an act of common labor or usual avocation within the prohibition of the Sunday law.—*The State v. Conger*, 396.

Verdict received on Sunday.] See CRIMINAL LAW, 18; VERDICT, 1.

SUPERVISOR.

Lucrative.] See OFFICE, &c., 7.

SUPREME COURT.

Causes remanded.] See PRACTICE, 9.

Judgments affirmed.} See PRACTICE, 10.

See HUSBAND AND WIFE, 6; SURETY OF THE PEACE, 11.

SURETYSHIP.

1. Proceedings to try the question of suretyship do not affect the proceedings of the plaintiff.—*Rooker et al. v. Wise*, 276.

2. The judgment rendered against a surety is the same as against his principal. If a surety does not apply for an order directing the sheriff to levy upon and exhaust the property of the principal first, &c., as provided by statute, he cannot complain on appeal that an execution might be issued against him as a principal.—*Ibid.*

SWAMP LANDS.

See CLAIMS AGAINST THE STATE, 1, 2.

T.

TALESMEN.

Sheriff not to Interrogate.] See CRIMINAL LAW, 19.

TAXES.

1. The *situs* of shares in an insurance company, at least for the purpose of taxation, is the domicil of the owner.—*The City of Evansville v. Hall*, 27.

2. Money or capital to be taxable in the city of *Evansville*, must be taxable for county purposes in the county of *Vanderburgh*.—*Ibid.*

3. The rights of eminent domain and taxation, may be exercised for public purposes, where no constitutional restriction forbids it.—*Anderson v. The Kerns Draining Co.*, 199.

4. There is no constitutional prohibition upon local taxation for objects in themselves local.—*Ibid.*

5. This case distinguished from the school cases.—*Ibid.*

6. The draining of marshes and ponds, for the promotion of the public health, is regarded as a public object, for the furtherance of which taxes may be assessed; but the draining of

farms to render them more productive, is not such an object, and a corporation organized for that purpose could not levy and collect a tax.—*Ibid.*

7. The trustees of a town have no power under the statute to assess and levy the corporation tax for the year, after the third *Tuesday in May*.—*The Town of Williamsport, &c. v. Kent et al.*, 306.
8. Sections 3 and 83 of the act to provide for the assessment of taxes in *Indiana*, found in 1 R. S. pp. 105, 127, are constitutional.—*Boyer v. Jones et al.*, 354.
9. By the R. S. of 1852, the personal property of a tax-payer is the primary fund out of which all taxes assessed against him upon poll, personal, and real estate, are to be collected, so long as it may be found within the county.—*Cones v. Wilson*, 465.
10. By the same statute, the aggregate amount of these taxes is a lien upon all the real estate of the tax-payer within the county; and no part of such real estate is discharged from the lien till the entire amount of the tax is paid; though the application of a part payment to a particular portion of such real estate, will relieve such portion from liability to sale until the remainder is exhausted. And this lien attaches on the first of *January*, annually.—*Ibid.*
11. An execution is a lien upon the defendant's property, as against all persons, from its delivery to the officer; yet the officer holding it should call upon the defendant for payment before he makes a levy; and a county treasurer must do so, as to taxes, before he levies upon or seizes the property by virtue of the duplicate.—*Ibid.*
12. The assignment of property to trustees for the payment of debts, is not such a transfer as will divest the lien of the state for taxes.—*Ibid.*
13. *Quære*, whether a lien for taxes holds personal property under any and all circumstances.—*Ibid.*

See ADVERSE POSSESSION, 2; DELINQUENT LIST; TAX-TITLE.

#### TAX-TITLE.

1. Under the R. S. 1824, the collector's conveyance of lands legally sold for taxes, invested the purchaser with an absolute estate in fee simple, even where the title of the delinquent tax-payer was simply an equitable one, derived from the *United States* by entry, the final payment of the purchase-money having been made, but the patent not having yet been issued.—*Doe ex dem. Dunn v. Hearick*, 242.
2. The patent, in such case, when issued, inured to the benefit of the collector's grantee.—*Ibid.*

#### TENANTS IN COMMON.

See WILL, 2.

#### TENDER.

1. A tender of the simple value of a specific article, after failure to deliver, is not sufficient: interest to the time of the tender should be included.—*Hamar v. Dimmick*, 105.
2. *Quære*, whether the general denial and tender are not inconsistent defenses.—*Ibid.*
3. *Quære*, whether the code prescribes the manner in which tender must be made, to bar costs, viz., by an offer to confess judgment.—*Ibid.*
4. Where the plaintiff recovered one-third more than was tendered, *held*, that the tender did not bar costs.—*Ibid.*

TIMBER—TREES.

See CONTRACT, 10.

TITLE TO REAL ESTATE.

Complaint in three paragraphs to recover land—1. In the usual form. 2. Upon a title-bond, for a conveyance of a life estate, remainder to heirs, given by *A.* to his daughter *B.*, alleging that since its execution *A.* had died, and that neither he nor his heirs had conveyed; that *B.* was also dead, and the plaintiffs were her heirs. 3. Like the second, adding that, through the ignorance of *A.* and the person who prepared the bond, a mistake occurred therein by using the word *heirs* instead of the word *children*, they using the former as synonymous with the latter, and intending the latter; that *B.* was put in possession as tenant for life. Answer, 1. The general denial to the first and second paragraphs, and that *A.* did not execute the bond. 2. That *A.* did not execute the bond, minutely setting forth the facts relied on. 3. That after the death of *A.*, *B.* and her husband instituted proceedings in chancery against *A.*'s heirs, on the bond, and obtained a decree and a deed in fee (the said heirs consenting thereto as an advancement), and entered upon the land and took it as their distributive share, &c., and, whilst so in possession, mortgaged the same to *C.*, who foreclosed, and bought in the land at the sale under his decree, and *C.* sold the land to the defendant, who, not relying upon said sale as conveying any interest other than that which descended to *B.* and the wife of *C.* (who was also a daughter of *A.*), on the same day took a quitclaim deed from the other heirs of *A.*

*Held*, on demurrer to the last paragraph of the answer, that the proceedings in chancery vested the fee simple in *B.*, and consequently the plaintiffs had no title.—*Small et al. v. Howland et al.*, 592.

See ADVERSE POSSESSION; COVENANT; JURISDICTION, 8; NUISANCE, 4; PLEADING, 8; TAX-TITLE; VENDOR AND PURCHASER, 5 to 11; WILL, 2.

TOWNSHIPS.

Organization of.] See CONSTITUTIONAL LAW, 7.

TOWNSHIP TRUSTEE.

Lucrative.] See OFFICE, &c., 7.

TRANSCRIPT.

Of Justice, how filed.] See APPEAL, 8.

TRESPASS.

See PRACTICE, 6.

TRESPASSING ANIMALS.

See FENCES; PARTIES, 2.

TRUSTS.

1. Under the statute of frauds of 1831, a declared trust in respect to lands, could not be set up by parol against an absolute deed importing a valuable consideration on its face; for such trust was inoperative, unless expressed in writing.—*Miller et al. v. Blackburn*, 62.

2. *Aliter*, with implied or resulting trusts.—*Ibid*.

See HUSBAND AND WIFE, 2; PARTNERSHIP; TAXES, 12.

## U.

### USE AND OCCUPATION.

In an action for the use and occupation of premises, the plaintiff may recover what the use was worth during the occupancy of the defendant, although that sum, in proportion to the annual value, be greater than the time of the occupancy in proportion to the whole year.—*Hanes v. Worthington*, 320.

## USURY.

1. *Quære*, whether bargaining for usurious interest at one time, and receiving it at a subsequent time, constitute separate offenses, so that a prosecution barred as to the bargaining, would lie as to the receiving.—*Swinney v. The State*, 315.
2. If such a prosecution would lie, the usurious interest must be proved to have been received from the person from whom it is charged in the information to have been received.—*Ibid*.
3. Where three of five notes had been paid with usurious interest, and suit was brought upon the remaining two, which were not usurious, the Court deducted the usurious interest paid upon the former notes, with 10 per cent. thereon, and gave plaintiff costs. *Held*, correct.—*Beauchamp v. Leagan*, 401.
4. Prosecution for receiving usurious interest. The affidavit states that the defendant "corruptly contracted for and received," &c. The information does not contain an averment to that effect. A motion to quash was overruled. *Held*, that the motion to quash should have been sustained. To constitute the offense of usury, a corrupt or usurious intention is requisite. Of course the corrupt or usurious intent should be charged in the information, which should be as certain as an indictment.—*Block v. The State*, 425.

See BILLS OF EXCHANGE; CONSTITUTIONAL LAW, 2; INFORMATION, 3; MORTGAGE, 2.

## V.

### VALUATION AND APPRAISEMENT.

A promissory note "waiving appraisement laws," is substantially a promise to pay the amount "without relief from valuation laws."—*Vesey et al. v. Reynolds*, 444.

See CONSTITUTIONAL LAW, 11; JUDGMENT, 1, 8.

## VARIANCE.

1. Where the record does not properly contain the evidence, the Supreme Court cannot determine whether there was a variance between the note sued on and that produced in evidence.—*Rooker et al. v. Wise*, 276.
2. If an indictment charge *A.* with stealing a horse, and the proof show that he stole a horse, saddle, and bridle, there is no variance.—*Jackson v. The State*, 327.
3. The plaintiff, *John C. Harvey*, alleges that the defendant, by his note, &c., promised to pay the plaintiff a certain sum of money. A copy of the note is set out, and constitutes a part of the complaint, and from this it appears that the note was payable to *J. C. Harvey*. *Held*, that the averments in the complaint, together with the copy of the note constituting a part of it, are equivalent to a direct allegation that the note was made to the plaintiff by the

name of *J. C. Harvey*; and the production of the note was sufficient, without any other proof, to sustain the action, it not being denied under oath that it was payable to the plaintiff.—*Farley v. Harvey*, 377.

*Between Verdict and Judgment.*] See PRACTICE, 29.

See AMENDMENT; CHANCERY, 1.

## VENDOR AND PURCHASER.

1. Where a contract for the sale and conveyance of land provided that the first payment of the purchase-money should be made "by the first day of *August*," it was held that an offer to pay on the 31st day of *July* was not premature. The language quoted is equivalent to "on or before," &c.—*Parker v. McAllister*, 12.
2. Where, by the terms of a contract for the sale and conveyance of land, the payment of the first installment of the purchase-money was to precede the execution of the deed, but the vendor refused to receive the money and execute the deed, a complaint by the vendee for specific performance, is not bad for not containing an averment of a tender of the notes and mortgage for the subsequent installments.—*Ibid.*
3. An action for the specific performance of such a contract, must be commenced in the county where the land is situate.—*Ibid.*
4. Where the answer in such an action set up the tender of a deed, and set forth a copy of it, a demurrer upon the ground that the wife of the vendor was not joined, was held bad, because it was not shown that he had a wife. That fact should be affirmatively shown by a reply.—*Ibid.*
5. A contract to make a deed or to convey, implies that the conveyance shall give the vendee a sufficient title, in view of the provisions of the statute defining what a deed must contain.—*Ibid.*
6. Upon an executory contract to convey land by deed with covenants of warranty, the seller must have, and offer to convey, a perfect title, at the time the last installment of purchase-money becomes due and the deed is to be executed, to enable him to recover unpaid purchase-money.—*Small v. Reeves*, 163.
7. Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants, while he retains the deed, and possession, and has been subjected to no inconvenience or expense on account of the defect of title.—*Ibid.*
8. Where incumbrances constitute the defect of title, the purchaser, where they are embraced by the covenants in his deed, may pay them off, and set up the amount in bar of recovery of an equal amount of purchase-money. And, perhaps, he may temporarily enjoin, under circumstances, the collection of the purchase-money.—*Ibid.*
9. In all cases where the purchaser is evicted upon a paramount title, within his covenants, he may set up the damage in bar of recovery of unpaid purchase-money; or, if the purchase-money has been all paid, he may sue, and recover for full damages, upon his covenants. It is otherwise where the deed is without covenants.—*Ibid.*
10. Any adverse possession, but especially such as is alleged in this case, at the time of the conveyance, it seems, is an eviction, and renders the conveyance made utterly void.—*Ibid.*
11. A judgment against a vendor accruing between the sale and the execution of the deed, is a breach of the covenant against incumbrances. It becomes a lien upon the land to the extent of the unpaid purchase-money; and though the purchaser cannot (he having extinguished no part of the incumbrance) recover more than nominal damages in a suit upon the covenant, yet he may pay the incumbrance, and set up the amount in bar of a recovery of

unpaid purchase-money. And he may set up this defense against the first note that falls due.—*Holman v. Creagmiles*, 177.

12. A. sold a piece of land which he held by a title-bond, and upon which he had made valuable improvements, to B., assigning the title-bond, and agreeing in writing to give possession of the land and improvements on a certain future day; but before that day the improvements were destroyed by fire. *Held*, that B. must sustain the loss.—*Thompson v. Norton et al.*, 187.

See MORTGAGE, 4; SCHOOL LANDS; TAX-TITLE.

#### VENUE.

Error cannot be assigned upon the ruling on an application for a change of venue.—*McCorkle v. The State*, 39.

See INFORMATION, 3.

#### VERDICT.

1. A verdict may be returned on *Sunday*; and the Court may sit on that day to receive it, and to receive any motion or order touching it, and the discharge of the jury rendering it.—*McCorkle v. The State*, 39; *Joy v. The State*, 139.
2. Verdict as follows: "We, the jury, find the defendant guilty as charged in the indictment, and that he be sentenced to the state prison for a term of two years. *Held*, substantially good.—*O'Herrin v. The State*, 420.
3. The affidavit of a juror is not competent to impeach the verdict.—*Sinclair v. Roush*, 450.

*Reception of.*]

See PRACTICE, 8, 12, 18, 19, 29.

See CONTRACT, 13; CRIMINAL LAW, 18, 49; NEW TRIAL, 12; NUISANCE, 3; PLEADING, 11, 21; SEDUCTION, 1, 2.

#### VERIFICATION.

See PLEADING, 2, 23.

#### W.

#### WAGER.

If A. sell goods to B. and C., and take their notes for payment, a wager between B. and C. to determine which shall pay the notes—A. not being a party to the wager—cannot affect A.'s right of action against them.—*Maulsby v. Wolf*, 457.

#### WARRANT.

*Of Auditor of State.*]

See CLAIMS AGAINST THE STATE.

#### WARRANTY.

See CONTRACT, 4; COVENANT, 2; GUARANTY.

#### WATERCOURSES.

See SUBTERRANEAN WATERS.

#### WATER-CRAFT LAW.

See MARITIME LIENS.

WIDOW.

See DESCENT; DOWER.

WILL.

1. Where a testator made his children residuary legatees, to whom all his property after the payment of debts and specific legacies, was to pass as legatees, not as heirs, giving his executor control of the property during their minority, it was held that § 137, 2 R. S. p. 280. did not apply so as to pass the control of the property to the guardian.—*Branch v. Holcraft*, 237.
2. Item in a will as follows: "My will and desire is that the farm on which I now live, together with the water grist mill, be rented out and the rents applied to the support and education of my three youngest children, viz., *Isaac*, *Hiram*, and *William M. Miller*, and to the support of my wife, *Anna Miller*, and to keep the said farm and mill in repair, until my son *Isaac* shall attain the age of twenty-one years. At that time, if they see cause, the mill and land to be sold, and the proceeds thereof equally divided by the said *Isaac*, *Hiram*, and *William M. Miller* (my wife, however, reserving to herself her right of dower in said premises during her natural life, and at her death to revert to the said *Isaac*, *Hiram*, and *William*); but should either die before that time, the whole to descend to the survivor; and should there be any overplus remaining out of the rent, it shall be put out at interest for the benefit of the children." *William M.* died during the minority of *Isaac*, *Hiram* being yet alive; but afterwards *Hiram* died intestate without issue, leaving a widow. After the death of *William M.*, but before that of *Hiram*, *Isaac* conveyed his undivided half of the property derived from the will, to one *Cox*.  
*Held*, first, that upon the death of *William M.*, if not at the death of the testator, the home farm and mill vested in *Isaac* and *Hiram*, subject to the widow's right of dower.  
 Second, but if the property did not vest till the majority of *Isaac*, he and *Hiram* then became tenants in common of it.  
 Third, that where in the construction of such a clause in a will, there is a doubt as to which point of time it was intended the estate should vest, the earliest will be taken as being the most equitable to the heirs of all the devisees.  
 Fourth, that *Isaac* inherited nothing from *Hiram*.  
 Fifth, that a party claiming under *Cox* could recover to the extent of his interest as grantee of *Isaac*.—*Miller et al. v. Keegan et al.*, 502.

See HUSBAND AND WIFE, 2, 4; JURISDICTION, 5.

WITNESS.

1. Where the Court orders a separation of the witnesses, and a party retains one of his witnesses in the house, whereby he hears the testimony of the others, the Court may refuse to hear his testimony.—*Jackson v. The State*, 327.
2. The code has not changed the common-law rule, that the state cannot be allowed to impeach its own witness in a criminal proceeding.—*Quinn v. The State*, 589.
3. The character of a witness cannot be impeached by proof of a single act of immorality.—*Long v. Morrison*, 595.

See ADMISSIONS; AGENCY; BASTARDY, 1, 2, 3; CHANCERY, 5; EVIDENCE, 14, 15; NEW TRIAL, 1.

WORK AND LABOR.

See PLEADING, 36, 38.

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